CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 4, 10, 12, 24, 102, 112, 113, 118, 122, 133, 141, 143, 144, 148, 162, 173, 174, and 181

(T.D. 99–64)

TECHNICAL CORRECTIONS TO THE CUSTOMS REGULATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by making certain technical corrections necessary to ensure that the regulations are as accurate and up-to-date as possible. Some of the corrections involve typographical and printing errors, some involve corrections to correlate with prior regulatory changes, some involve changes to regulatory language to more accurately reflect the underlying statutory language; however, none of the corrections involve changes in substantive legal requirements.

EFFECTIVE DATE: August 10, 1999.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, Regulations Branch (202) 927–2391.

SUPPLEMENTARY INFORMATION:

BACKGROUND

It is Customs policy to periodically review its regulations to ensure that they are as accurate and up-to-date as possible, so that the importing and general public are aware of Customs programs, requirements, and procedures regarding import-related activities. As part of this review policy, Customs has determined that certain changes affecting sections 4, 10, 12, 24, 102, 112, 113, 118, 122, 133, 141, 143, 144, 148, 162, 173, 174 and 181 of the Customs Regulations (19 CFR Parts 4, 10, 12, 24, 102, 112, 113, 118, 122, 133, 141, 143, 144, 148, 162, 173, 174 and 181) are necessary to correct typographical and citation-referencing errors, and to make certain conforming changes to the regulations. Many

of these changes are being made to conform the language in the Customs Regulations to the language of the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, Title VI)("the Mod Act"). Following is a summary of these changes:

DISCUSSION OF CHANGES

Part 4

Section 4.9(f) provides that the master of a vessel who fails to make entry or presents any entry document which is forged, altered or false is liable for certain civil penalties, as provided in 19 U.S.C. 1436. This document amends § 4.9(f) to reflect the amendment to 19 U.S.C. 1436 by section 611 of the Mod Act that penalties are also applicable for electronically transmitting any forged, altered, or false document, paper, information, data or manifest to Customs.

Section 4.12(a)(5) provides that unless the vessel master provides the required notification of a manifest discrepancy and that the discrepancy was due to clerical error, applicable penalties will be assessed. Further, repeated manifest discrepancies may be deemed negligent and not clerical error. This document amends the definition of "clerical error" to match the definition provided in 19 U.S.C. 1584 as amended by section 619 of the Mod Act, to include electronic submissions. Accordingly, after the word "submission" the words "(electronically or otherwise)" are added.

Section 4.61(b) requires the port director to verify that a vessel is in compliance with certain requirements prior to granting clearance. Section 4.61(b)(3), concerning documentation, makes a reference to § 4.64, which is a "reserved" section. Therefore, this document deletes the reference to § 4.64.

Section 4.82 concerns vessels touching at a foreign port while in coastwise trade. In § 4.82(a) and (d), footnotes 112, and 113, respectively contain requirements pertaining to manifests of cargo and whether a duty is payable by reason of a vessel taken in at one port of the United States and touching at a foreign port during the voyage. Changes made to 19 U.S.C. 293 and 294, as amended by section 686 of the Mod Act, necessitate the removal of footnotes 112 and 113, respectively. Further, in § 4.82(a), there is a reference to Great Lakes license endorsements which were repealed by Pub.L. 104–324, Title XI, § 1115(a), 110 Stat. 3972 (October 19, 1996). Accordingly, the language referring to Great Lakes license endorsements in § 4.82(a) is deleted.

Part 10

In § 10.41b(b)(1), concerning receiving permission from the port director for release of certain shipping devices in international traffic without entry or duty and without the shipping devices being serially numbered or marked, the number "13" inadvertently appears between the words "serially" and "numbered". The number "13" is, therefore, deleted.

In § 10.41b(b)(2)(iv), concerning the reporting period for the clearance of serially numbered substantial holders or outer containers, the number "14" inadvertently appears between the word "tendered" and an open parenthesis mark. The number "14" is, therefore, deleted.

In § 10.41b(b)(4), concerning the port director's actions on the application for exemption from serial numbering or marking requirements, the number "15" inadvertently appears between the words "the" and "application". The number 15 is, therefore, deleted.

Part 12

In § 12.8(b), concerning liquidated damages assessed for breach of a bond on imported meat, meat-food products, horse meat, and horse meat-food products, the monetary cap of $20,000 for cancellation of liquidated damages by a port director is referenced. However, § 172.21 provides that a Fines, Penalties, and Forfeiture Officer may cancel claims for liquidated damages when the claim is $100,000 or less. Accordingly, for consistency, § 12.8(b) is revised to replace the $20,000 with $100,000.

Part 24

In § 24.21(b)(9), concerning the fees charged for administrative overhead costs, the reference to "§ 111.12(a)(2)" is revised to read "§ 111.12(a)".

In § 24.24(g), concerning the maintenance of records for the harbor maintenance fee, the last sentence references "§§ 162.1a through 162.1i"; however, effective July 16, 1998, the adoption of new Part 163 replaces the reference for those sections. Accordingly, the reference is revised to "part 163".

Part 102

Section 102.20 lists for specific North American Free Trade Agreement purposes specific tariff shift rules and other requirements for determining the country of origin of imported goods other than textiles and apparel products covered by § 102.21. In § 102.20(p), Section XVII: Chapters 86 through 89, the entry under "Tariff shift and/or other requirements" for 8716.10–8716.80 is grammatically unclear and is revised to read "A change to subheading 8716.10 through 8716.80 from any other heading, or from subheading 8716.90 except when that change is pursuant to General Rule of Interpretation 2(a)."

Part 112

In § 112.41, concerning identification cards for a licensed cartman or lighterman and their employees, the title "the Bureau of Customs" is used. Customs is officially a "Service", not a "Bureau". Accordingly, the words "the Bureau of" are deleted.

Part 113

In § 113.38(c)(4), concerning Customs review of a submission by a delinquent surety before determining whether to not accept further bonds from the surety, there is a reference to "(c)(4)". Due to the dele-

tion of a prior paragraph the numbering for this reference should read "(c)(3)". Accordingly, the reference to "(c)(4)" is revised to read "(c)(3)".

Part 118

In § 118.12, concerning a port director's actions on an application for a centralized examination station (CES), the second sentence is amended by deleting the word "imported" to conform to changes made in T.D. 98–29.

Part 122

In § 122.162(b), concerning the failure to notify the port director and explain differences in an air cargo manifest, the definition of "clerical error" is being changed to match the definition provided in 19 U.S.C. 1584 as amended by section 619 of the Mod Act, to include electronic submissions and correspond to the identical definition appearing at § 4.12(a)(5).

Part 133

In §§ 133.26 and 133.46, involving the demand for redelivery of released merchandise and the demand for redelivery of released articles, respectively, the reference to § 141.113(g) should read § 141.113(h). The reference is accordingly revised.

Part 141

Sections 141.64, 141.90(a) and 141.103 are amended in light of the amendment of 19 U.S.C. 1484 by section 637 of the Mod Act which shifted to the importer of record the burden to use reasonable care in providing to Customs the correct classification, appraisement and rate of duty applicable to merchandise in entry documentation, and furnishing at the time of entry sufficient information to enable Customs to determine admissibility, assess proper duties, collect accurate statistics and to determine compliance with any other legal requirement. Accordingly, Customs believes that the regulations should no longer provide that Customs has the burden to review entry and entry summary documentation before acceptance to ensure that all entry and statistical requirements are complied with and that indicated values and rates of duty appear to be correct; § 141.64 currently provides that Customs has that burden. Section 141.64 is being amended to reflect that while it is not Customs burden to review entry and entry summary documentation, Customs may still in its discretion return documentation in which errors are found prior to acceptance. Further, in accordance with 19 U.S.C. 1484, the entered tariff classification, rate of duty, value and estimated duties no longer need to be approved by the port director; § 141.90(a) now provides that the port director has this responsibility. Also, as a result of the above amendment to section 1484, it is not the port director's responsibility to determine the amount of estimated duties "deemed necessary" to be deposited; § 141.103 now states that this is the port director's responsibility. Accordingly, as it is now the responsibility of the importer of record to use "reasonable care" in submitting

proper information and documentation with Customs, pursuant to 19 U.S.C. 1484, these responsibilities of Customs regarding acceptance of entry documentation are removed from the regulations. To effect this, § 141.64 is amended by removing the word "shall" in the first sentence and inserting the word "may" in its place; § 141.90 is amended by removing and reserving paragraph (a); and § 141.103 is amended by removing the words "deemed necessary by the port director".

In § 141.68(b), concerning when an entry summary serves as both the entry documentation and entry summary, there is a reference to § 142.13(c). Pursuant to a realignment of the paragraphs of § 142.13 by T.D. 95–77, the correct reference should be "§ 142.13(b)". The reference is accordingly revised.

In § 141.113(b), concerning the recall of textiles and textile products released from Customs custody, the reference to § 113.62(k)(1) should read § 113.62(l)(1). The reference is accordingly revised.

Part 143

In § 143.21(j), concerning merchandise determined to be unique in character or design so as to be eligible for informal entry, the language is clarified by deleting the word "so" before the word "unique" and adding ", such" after the word "design".

Part 144

Section 144.37(h)(2)(vi) concerns a Class 9 warehouse withdrawal for exportation using a sales ticket for goods purchased in a duty-free store. This section is corrected to reflect that the importer's personal exemption is available as to goods purchased in a duty-free store, should such goods later be returned to the United States. This conforms the section with 19 U.S.C. 1555(b)(6)(B) and § 19.35(e)(2).

Part 148

In § 148.51(a)(1), concerning the application for exemption from duty and internal revenue tax by a nonresident arriving in the U.S. who is not entitled to an exemption for gifts, the reference to subheading "9804.00.39", HTSUS is incorrect. This reference is amended to read subheading "9804.00.30", HTSUS.

Part 162

In § 162.65(c), concerning the notice and demand for payment of a penalty for cargo or baggage containing unmanifested narcotic drugs or marihuana, the last word of the first sentence "responsiblie" is misspelled. This document corrects the misspelled word.

Section 162.72(b), concerning the penalties for violation of section 584(a)(1), Tariff Act of 1930 (19 U.S.C. 1584(a)(1)), as amended, states that the penalty for lack of or discrepancy in a manifest is $500. Pursuant to 19 U.S.C. 1584, the penalty amount of $500 has been increased to $1000. This document corrects the regulation to reflect the correct statutory penalty.

In § 162.73, concerning penalties under section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), the language is revised to reflect that

pursuant to Pub. L. 104–295, the penalty is applicable to taxes and fees as well as duties.

In § 162.74(c), as amended by T.D. 98–49 published in the Federal Register (63 FR 29126) on May 28, 1998, concerning the tender of actual loss of duties under a prior disclosure by a person of a violation of law committed by that person involving the filing or attempted filing of a drawback claim, or an entry or introduction, or attempted entry or introduction of merchandise in the United States by fraud, gross negligence, or negligence, the words "his or her" in the second sentence are misleading regarding the fact that Customs calculates the actual loss of duties. This document clarifies the matter.

In § 162.79b, concerning the recovery of the actual loss of duties resulting from a violation of 19 U.S.C. 1592, the language is revised to reflect that there is liability for taxes and fees as well as duties.

Part 173

Section 173.6 provides that where there is probable cause to believe there is fraud in a case, a port director may reliquidate an entry within two years after the date of liquidation or last reliquidation. This section is being removed from the regulations. The authority for § 173.6 was 19 U.S.C. 1521 which was repealed by section 618 of the Mod Act.

Part 174

In § 174.13(a), concerning the contents of a protest, there are nine paragraphs detailing the types of information required. The connective word "and" should be set forth between paragraphs (a)(8) and (a)(9), rather than between paragraphs (a)(7) and (a)(8) as is currently printed. Also, in (a)(9), the word "declaration" is misspelled as "delcaration". This document corrects these errors.

Part 181

In § 181.82(b)(1)(ii), concerning "voluntarily" correcting a declaration in connection with a claim for preferential tariff treatment for a good under NAFTA so as to not be subject to a penalty, the reference to "§ 162.74(g)" is revised to read "§ 162.74(i)". This reflects the restructuring of § 162.74 set forth in T.D. 98–49.

In § 181.93(b)(5)(i)(B)(*4*), concerning whether the requester for a NAFTA advance ruling has knowledge that the issue is already subject of a request for an advance ruling, there is a reference to § 181.76(d)(1). However, because a new section (b) was added to § 181.76 by T.D. 95–68, the original § 181.76(d)(1) was redesignated as § 181.76(e)(1). Therefore, the reference to "§ 181.76(d)(1)" is revised to read "§ 181.76(e)(1)".

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT REQUIREMENTS, DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Inasmuch as these amendments merely correct certain typographical, technical and printing errors in the regulations and otherwise con-

form the Customs Regulations to existing law or practice, pursuant to 5 U.S.C. 553(a)(2) and (b)(B), good cause exists for dispensing with notice and public procedure thereon as unnecessary. For the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(a)(2) and (d)(3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This amendment does not meet the criteria for a "significant regulatory action" as defined in E.O. 12866.

Drafting Information

The principal author of this document was Keith B. Rudich, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects

19 CFR Part 4

Bonds, Cargo vessels, Common carriers, Customs duties and inspection, Declarations, Drug traffic control, Entry, Exports, Fees, Foreign commerce and trade statistics, Freight, Harbors, Imports, Inspection, Merchandise, Penalties, Prohibited merchandise, Reporting and recordkeeping requirements, Shipping, Vessels.

19 CFR Part 10

Customs duties and inspection, Imports, Reporting and recordkeeping requirements.

19 CFR Part 12

Animals, Bonds, Customs duties and inspection, Economic sanctions, Entry of merchandise, Fees assessment, Imports, Meats, Reporting and recordkeeping requirements, Sanctions.

19 CFR Part 24

Accounting, Customs duties and inspection, Fee, Financial and accounting procedures, Harbors, Reporting and recordkeeping requirements, Taxes, User Fees.

19 CFR Part 102

Customs duties and inspection, Customs ports of entry, Imports, Shipments, Sureties.

19 CFR Part 112

Administrative practice and procedure, Customs duties and inspection, Exports, Freight forwarders, Imports, Reporting and recordkeeping requirements.

19 CFR Part 113

Bonds, Customs duties and inspection, Reporting and recordkeeping requirements, Surety bonds.

19 CFR Part 118

Administrative practice and procedure, Bonds, Customs duties and inspection, Drug traffic control, Reporting and recordkeeping requirements, Security measures.

19 CFR Part 122

Administrative practice and procedure, Bonds, Customs duties and inspection, Freight, Imports, Penalties, Reporting and recordkeeping requirements.

19 CFR Part 133

Customs duties and inspection, Fees assessment, Imports, Penalties, Prohibited merchandise, Reporting and recordkeeping requirements, Restricted merchandise, Seizures and forfeitures, Trademarks, Trade names.

19 CFR Part 141

Customs duties and inspection, Entry of merchandise, Reporting and recordkeeping requirements.

19 CFR Part 143

Automated Broker Interface (ABI), Customs duties and inspection, Electronic entry filing, Entry of merchandise, Invoice requirements, Reporting and recordkeeping requirements.

19 CFR Part 144

Customs duties and inspection, Reporting and recordkeeping requirements, Warehouses.

19 CFR Part 148

Aliens, Customs duties and inspection, Declarations, Foreign officials, Privileges and immunities, Reporting and recordkeeping requirements, Taxes.

19 CFR Part 162

Administrative practice and procedure, Customs duties and inspection, Drug traffic control, Inspection, Law enforcement, Penalties, Prohibited merchandise, Restricted merchandise, Reporting and recordkeeping requirements, Search warrants, Seizures and forfeitures.

19 CFR Part 173

Administrative practice and procedure, Customs duties and inspection.

19 CFR Part 174

Administrative practice and procedure, Customs duties and inspection, Reporting and recordkeeping.

19 CFR Part 181

Administrative practice and procedure, Canada, Customs duties and inspection, Imports, Mexico, Reporting and recordkeeping requirements, Trade agreements (North American Free-Trade Agreement).

AMENDMENT TO THE REGULATIONS

In accordance with the preamble, Parts 4, 10, 12, 24, 102, 112, 113, 118, 122, 133, 141, 143, 144, 148, 162, 173, 174 and 181 of the Customs Regulations (19 CFR Parts 4, 10, 12, 24, 102, 112, 113, 118, 122, 133, 141, 143, 144, 148, 162, 173, 174 and 181) are amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4 and the specific relevant authority citations for §§ 4.9, 4.12, and 4.82 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91.

* * * * * * *

Section 4.9 also issued under 42 U.S.C. 269; 46 U.S.C. App. 677;

* * * * * * *

Section 4.12 also issued under 19 U.S.C. 1584;

* * * * * * *

Section 4.82 also issued under 19 U.S.C. 293, 294, 46 U.S.C. App. 123;

* * * * * * *

2. Section 4.9(f) is amended by removing in the first sentence the language "any document required by this section which is forged, altered, or false," and adding in its place the words "or transmits, electronically or otherwise, any forged, altered, or false document, paper, information, data or manifest,".

3. Section 4.12(a)(5) is amended by adding in the second sentence after the word "submission" the words "(electronically or otherwise)".

4. Section 4.61(b)(3) is amended by removing the parenthetical reference "(§ 4.64)".

5. Section 4.82(a) is amended to add in the first sentence after the first word "A" the words "United States", and to remove the words ", where appropriate, a Great Lakes license endorsement" and add in their place the words "coastwise endorsement, or both".

6. Part 4 is amended by removing and reserving footnotes 112 and 113; and removing the superscript footnote referencing designations 112 and 113 from the text.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10 and the specific relevant authority citation for § 10.41b continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314.

* * * * * * *

Section 10.41b also issued under 19 U.S.C. 1202 (Chapter 98, Subchapter III, U.S. Note 3, HTSUS);

* * * * * * *

2. Section 10.41b(b)(1) is amended by removing in the first sentence the number "13" which appears between the words "serially" and "numbered".

3. Section 10.41b(b)(2)(iv) is amended by removing the number "14" which appears between the word "tendered" and a parenthetical clause.

4. In § 10.41b(b)(4), the third sentence is amended by removing the number "15" which appears between the words "the" and "application".

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The general authority citation for Part 12 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * * * *

2. Section 12.8(b) is amended in the first sentence by removing the monetary cap of "$20,000" and adding in its place the monetary cap of "$100,000".

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority citation for Part 24 and the specific relevant authority for § 24.24 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1450, 1624, 31 U.S.C. 9701.

* * * * * * *

Section 24.24 also issued under 26 U.S.C. 4461, 4462;

* * * * * * *

2. Section 24.21(b)(9) is amended by removing the citation "111.12(a)(2)" and adding in its place the citation "§ 111.12(a)".

3. In § 24.24(g), the last sentence is amended by removing the citations "§§ 162.1a through 162.1i" and adding in their place the citation "part 163".

PART 102—RULES OF ORIGIN

1. The general authority citation for Part 102 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624, 3314, 3592.

* * * * * * *

2. Section 102.20(p), "Section XVII: Chapters 86 through 89", is amended by revising the entry in the "Tariff shift and/or other requirements" column adjacent to 8716.10–8716.80 in the "HTSUS" column,

to read "A change to subheading 8716.10 through 8716.80 from any other heading, or from subheading 8716.90 except when that change is pursuant to General Rule of Interpretation 2(a)."

PART 112—CARRIERS, CARTMEN, AND LIGHTERMEN

1. The general authority citation for Part 112 continues to read as follows:

Authority: 19 U.S.C. 66, 1551, 1565, 1623, 1624.

* * * * * * *

2. Section 112.41 is amended by removing in the first sentence the words "the Bureau of".

PART 113—CUSTOMS BONDS

1. The general authority citation for Part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

* * * * * * *

2. Section 113.38(c)(4) is amended by removing in the first sentence the reference to "(c)(4)" and adding in its place "(c)(3)".

PART 118—CENTRALIZED EXAMINATION STATIONS

1. The general authority citation for Part 118 continues to read as follows:

Authority: 19 U.S.C. 66, 1499, 1623, 1624; 22 U.S.C. 401; 31 U.S.C. 5317.

* * * * * * *

2. Section 118.12 is amended by removing the word "imported" from the last sentence.

PART 122—AIR COMMERCE REGULATIONS

1. The general authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a.

* * * * * * *

2. Section 122.162(b) is amended by removing the words ", made when the manifest is prepared, assembled or submitted" and adding in their place the words "in the preparation, assembly, or submission (electronically or otherwise) of the manifest".

PART 133—TRADEMARKS, TRADE NAMES AND COPYRIGHTS

1. The general authority citation for Part 133 and the specific relevant authority citation for §§ 133.26 and 133.46 continue to read as follows:

Authority: 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

* * * * * * *

Sections 133.26 and 133.46 also issued under 19 U.S.C. 1623.

* * * * * * *

2. Sections 133.26 and 133.46 are amended by removing the citation "§ 141.113(g)" and adding in its place the citation "§ 141.113(h)".

PART 141—ENTRY OF MERCHANDISE

1. The general authority citation for Part 141 and the specific relevant authority citations for §§ 141.68, 141.90, and 141.113 continue to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

* * * * * * *

Section 141.68 also issued under 19 U.S.C. 1315;

* * * * * * *

Section 141.90 also issued under 19 U.S.C. 1487;

* * * * * * *

Section 141.113 also issued under 19 U.S.C. 1499, 1623.

2. Section 141.64 is amended by removing the word "shall" in the first sentence and adding in its place the word "may".

3. Section 141.68(b) is amended by removing the citation "§ 142.13(c)" and adding in its place "§ 142.13(b)".

4. Section 141.90 is amended by removing and reserving paragraph (a).

5. Section 141.103 is amended by removing the words "deemed necessary by the port director".

6. Section 141.113(b) is amended by removing the citation "§ 113.62(k)(1)" and adding in its place "§ 113.62(l)(1)".

PART 143—SPECIAL ENTRY PROCEDURES

1. The general authority citation for Part 143 continues to read as follows:

Authority: 19 U.S.C. 66, 1481, 1484, 1498, 1624.

* * * * * * *

2. Section 143.21(j) is amended by removing the word "so" which appears before the word "unique", and by adding ", such" after the word "design".

PART 144—WAREHOUSE AND REWAREHOUSE ENTRIES AND WITHDRAWALS

1. The general authority citation for Part 144 and the specific authority citation for § 144.37 continue to read as follows:

Authority: 19 U.S.C. 66, 1484, 1557, 1559, 1624.

* * * * * * *

Section 144.37 also issued under 19 U.S.C. 1555, 1562.

2. In § 144.37(h)(2)(vi), the first sentence is amended by removing the phrase "without personal exemption" and adding in its place the phrase "with personal exemption".

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

1. The general authority citation for Part 148 and the specific relevant authority citation for § 148.51 continue to read as follows:

Authority: 19 U.S.C. 66, 1496, 1498, 1624. The provisions of this part, except for subpart C, are also issued under 19 U.S.C. 1202 (General Note 20, Harmonized Tariff Schedule of the United States).

* * * * * * *

Sections 148.43, 148.51, 148.63, 148.64, 148.74 also issued under 19 U.S.C. 1321;

* * * * * * *

2. Section 148.51(a)(1) is amended by removing the reference "9804.00.39" and adding in its place "9804.00.30"

PART 162—INSPECTION, SEARCH AND SEIZURE

1. The general authority citation for Part 162 and the specific relevant authority citation for §§ 162.65 and 162.72 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624.

* * * * * * *

Section 162.65 also issued under 19 U.S.C. 1584, 21 U.S.C. 960, 961;

Sections 162.65 and 162.72 also issued under 19 U.S.C. 1431(b) and 19 U.S.C. 1644.

2. Section 162.65(c) is amended by removing the last word of the first sentence, "responsiblie", and adding in its place the word "responsible".

3. Section 162.72(b) is amended by removing the amount "$500" in paragraphs (b)(1), (b)(2) and (b)(3)(ii) and by adding "$1,000" in its place.

4. Section 162.73 is amended by adding after the word "duties" appears in paragraphs (a)(2)(i), (a)(2)(ii), (a)(3)(i), (a)(3)(ii), (b)(1)(i), (b)(1)(ii), and (b)(2), the words ", taxes and fees".

5. Section 162.74(c) is amended by removing in the second sentence the words "his or her" and adding in their place "Customs".

6. Section 162.79b is amended by adding after each time the word "duties" appears in the heading and text, the words ", taxes and fees".

PART 173—ADMINISTRATIVE REVIEW IN GENERAL

1. The authority citation for part 173 continues to read as follows:

Authority: 19 U.S.C. 66, 1501, 1520, 1624.

2. Section 173.6 is removed.

PART 174—PROTESTS

1. The general authority citation for Part 174 continues to read as follows:

Authority: 19 U.S.C. 66, 1514, 1515, 1624.

* * * * * * *

2. Section 174.13(a)(7) is amended by removing the last word, "and".

3. Section 174.13(a)(8) is amended by removing the period at the end of the sentence and adding in its place "; and".

4. Section 174.13(a)(9) is amended by removing the word "delcaration" and adding in its place the word "declaration".

PART 181—NORTH AMERICAN FREE TRADE AGREEMENT

1. The general authority citation for Part 181 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624, 3314.

* * * * * * *

2. Section 181.82(b)(1)(ii) is amended by removing the reference "§ 162.74(g)" and adding in its place "§ 162.74(i)".

3. Section 181.93(b)(5)(i)(B)(*4*) is amended by removing the reference "§ 181.76(d)(1)" and adding in its place "§ 181.76(e)(1)".

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: July 6, 1999.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, August 10, 1999 (64 FR 43262)]

19 CFR Parts 151, 174, and 178

(T.D. 99–65)

RIN 1515–AB75

DETENTION OF MERCHANDISE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide for procedures regarding the detention of merchandise that is undergoing extended Customs examination. The changes promulgated accurately reflect amendments to the underlying statutory authority, enacted as part of the Customs modernization portion of the North American Free Trade Agreement Implementation Act. The regulations provide importers with an accelerated method to receive administrative or judicial review of any decision to exclude merchandise from the United States. Certain other conforming amendments are also made.

EFFECTIVE DATE: September 10, 1999.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Penalties Branch, Office of Regulations and Rulings, 202–927–2344.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In a notice of proposed rulemaking (NPRM) published in the Federal Register (61 FR 28522) on June 5, 1996, Customs proposed to amend the provisions of part 151 of the Customs Regulations (19 CFR part 151), relating to the examination, sampling and testing of merchandise, to provide for procedures to be followed with regard to the detention of merchandise. Section 613 of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, Title VI of which is popularly known as the Customs Modernization Act (Mod Act), amended the provisions of section 499 of the Tariff Act of 1930, as amended (19 U.S.C. 1499), to provide for the detention of merchandise in any case where Customs is unable, upon initial examination, to make a determination as to whether that imported merchandise may be released into commerce or seized or denied entry because of some sort of defect regarding its admissibility into the United States. This legislation brought the law into conformity with existing Customs practice with regard to the examination and detention of merchandise.

Prior to this amendment, Customs, while having extensive examination and broad detention authority, had no specific statutory or regulatory procedures for detaining merchandise whose admissibility had not yet been determined. The Mod Act codified Customs current detention

practices and provided importers with an accelerated method to receive administrative or judicial review of any decision to exclude or a deemed exclusion.

Under the provisions of section 613, Customs has five working days after merchandise is presented for examination to determine whether such merchandise should be detained or can be released. The NPRM provided that merchandise shall be considered to be presented for Customs examination when it is in a condition to be viewed and examined by a Customs officer. Mere presentation to the examining officer of a cargo van, container, or instrument of international traffic in which the merchandise to be examined is contained was not to be considered to be presentation of the merchandise for Customs examination purposes so as to start the five-day period in which the decision to detain or release must be made. Further, consistent with the provisions of § 151.7 of the Customs Regulations (19 CFR 151.7), relating to the examination of merchandise at a place other than the public stores, the importer shall bear any expense involved in preparing or transporting the merchandise for Customs examination.

The NPRM required Customs to issue a written notice of detention to the importer or other party having an interest in the merchandise. The notice of detention must advise the importer or other interested party of the initiation of the detention, the specific reason for, and the anticipated length of, the detention, the nature of the tests or inquiries to be conducted and the nature of any information which, if supplied to the Customs Service, may accelerate the disposition of the detention. After 30 days, or such longer period authorized by law, if Customs has not made a determination to release or seize, the goods are deemed to be excluded for purposes of 19 U.S.C. 1514. Under the proposed rule, the 30-day limitation could be extended when the importer or interested party requests in writing an extension of the detention period, in order to comply with Customs requirements. Barring that, the importer or interested party may file a protest as to the exclusion. If, within 30 days after filing of the protest, Customs fails to act, the importer or interested party may seek judicial review in the Court of International Trade. The proposed regulations also permitted Customs to allow exportation of the goods in lieu of seizure with all costs of exportation being borne by the importer.

The statute compels Customs to make timely decisions, provide timely notices, disclose available testing results and descriptions of procedures and methodologies that are not proprietary to Customs or the holder of any copyright or patent, and process any exclusion protests within a prescribed statutory time period. If a notice to exclude is not issued within such time period and a court action is commenced, the burden of proof is on Customs, by a preponderance of the evidence, to show good cause as to why an admissibility decision had not been made prior to the time the importer commenced suit. If Customs makes the decision to exclude, an importer wishing to challenge the decision shall

bear the burden of proof. These procedures are applicable to those cases where Customs has the responsibility and authority to determine the admissibility of the merchandise. They do not apply to those situations where the decision of admissibility is vested with another Federal agency.

One party responded to the NPRM, making various comments. A description of each comment made, followed by Customs response to the comment, is set forth below.

DISCUSSION OF COMMENTS

Comment:

The commenter suggests that the statute did not contemplate that all detentions arising from laws administered by other government agencies would be exempt from the new detention and seizure provisions. The commenter notes that the legislative history to the Mod Act simply recognized that Customs often detains merchandise on behalf of other agencies, but specifically stated that the law would not preclude application of this new procedure to those situations if agreed to by the other agency. As such, the commenter avers that Congress clearly provided authority for all imports to be governed by the same time restraints and notice procedures.

Customs Response:

The legislative history to which the commenter refers expressly states that nothing in the statute is intended to change the procedures or relationship between Customs and other Federal agencies. This would not preclude application of this new procedure and remedy in those cases where Customs has the responsibility and authority to determine the admissibility of the merchandise, and such procedure and remedy are agreed to by the other agency. However, it does not authorize application of the new procedure to detentions made by Customs on behalf of another agency that retains the authority to make its own admissibility determinations.

A full reading of the legislative history makes it clear that Congress had no intention of unilaterally applying Customs detention procedures in instances where longstanding procedures of other agencies are in place. Nor would the new detention provisions apply in any situation where the determination as to admissibility of merchandise rests with the other agency. For example, the newly legislated procedures would not be applicable to determinations of admissibility of imported merchandise as required by the Food, Drug and Cosmetic Act (see 21 U.S.C. 381). The Food and Drug Administration (FDA), and not Customs, is responsible for determinations of admissibility of importations that fall under that Act. A full complement of regulations providing for a well-established detention and hearing program for such merchandise is already in place. Customs detention procedures promulgated in this final rule are clearly inapplicable in such a setting.

Comment:

The commenter asks for clarification as to whether copyright and trademark requirements are governed by the proposed regulations.

Customs Response:

The regulations governing the detention of possibly piratical (copyright violations) merchandise are specifically enumerated in part 133, subpart E, Customs Regulations (19 CFR part 133, subpart E), and find their statutory origins in 17 U.S.C. 603. The regulations governing the detention of confusingly similar trademark-violative merchandise are specifically enumerated in part 133, subpart C, Customs Regulations (19 CFR part 133, subpart C) and find their statutory origins in 15 U.S.C. 1124. Section 151.16 is changed to confirm the inapplicability of its detention notice requirements to those situations involving suspected piratical or confusingly similar merchandise. It should be noted that regulatory changes have recently been issued in a separate document (T.D. 98–21, 63 FR 11825, dated March 11, 1998), which clarify detention procedures with regard to suspected copyright and trademark violations.

Comment:

The commenter states that the proposed rule does not assure that the importer is aware of the date that triggers the five-working day period for decision-making by the Customs Service. It is averred that the regulation should require that Customs provide notice to the importer or broker of the date of availability of the merchandise for examination so that the importer is aware of its rights and can exercise those rights without making *ad hoc* inquiries to the Customs Service. Additionally, the commenter suggests that the notice of detention should indicate the date on which the merchandise was presented for examination.

Customs Response:

Customs agrees that the date the merchandise was presented for examination should appear on the notice of detention and § 151.16(c)(1) has been amended to provide for this. It is also Customs view that it would be an unnecessary burden to send an additional notification to the importer of the date that presentation actually occurred. When intensive examination of a shipment is to be undertaken, the importer or agent of the importer (generally the Customs broker) is apprised of the fact and is instructed to arrange to present the merchandise for examination. Once the importer or his agent has arranged for the examination, it would be wasteful of resources to require the Government to send an additional notice that the merchandise for which examination has been arranged was actually presented for examination on a date certain.

Comment:

The commenter proposes that Customs should be required to issue a notice of detention when it fails to act to release the goods within the

initial 5-working day period, but does not make a formal decision to detain the merchandise.

Customs Response:

Section 151.16(b) states that merchandise that is not released within the 5-working day period shall be considered to be detained merchandise. As such, Customs is required to send a notice of detention on this merchandise. Section 151.16(c) is amended to make this clear.

Comment:

The commenter suggests, in reference to proposed § 151.16(i), that Customs retain authority to approve any protest and release or seize the merchandise up to and after a summons is filed in the Court of International Trade. The commenter states that it would be counterproductive to require an importer to go to court for a favorable decision where Customs intends to act favorably but merely misses the 30-day deadline. The commenter notes that the legislative history to the statute recognizes the continuing authority of Customs to release the merchandise where a protest is "deemed" denied.

Customs Response:

Customs agrees that if an action concerning a deemed denial of a protest with respect to a detention has not been commenced in the Court of International Trade, Customs has the authority to act favorably on the protest and release the merchandise; however, if an action is commenced, Customs is of the view that the matter is within the jurisdiction of the Court and release could only be ordered by the Court. Also, Customs is of the view that it has the authority officially to deny the protest in accordance with § 174.30 of the Customs Regulations.

Consequently, § 151.16 is changed by adding a new paragraph (h) to reflect Customs authority to grant protests that have been deemed denied and to release detained goods or to deny protests in accordance with section 174.30 of the Customs Regulations at any time prior to initiation of a court action pursuant to 28 U.S.C. 1581.

Comment:

The commenter indicates that no sensitive import information should be released to a third party based upon "suspicion" or without first providing a reasonable opportunity for the importer to resolve the questions concerning the detention directly with Customs. The commenter states that if Customs adopts the subject proposed rule in concert with a second separate proposed rule (58 FR 44476, dated August 23, 1993) which involves the release of sensitive information to trademark owners where merchandise is detained under suspicion that it bears an infringing trademark or copyright, then the possibility will be created that information will be provided to third persons because merchandise was "deemed" detained or seized. The commenter indicates that the subject proposed rule must be modified to assure that the release of information only occurs where there is an affirmative decision

by Customs that there is a violation and the importer has not directly resolved the issue with Customs.

Customs Response:

In Customs view, the rule as proposed and as adopted here does not provide for the release of confidential or proprietary business information to any parties. Further, the commenter does not suggest how the rule is suspect with regard to the release of this sensitive information.

Merchandise will be detained when a question as to admissibility arises and further examination or testing is required. Indeed, the final rule is careful to exempt specifically from release any information on testing procedures or methodologies that are proprietary to holders of copyrights or patents (§ 151.16(d)). Customs believes that this final rule does not serve to assist in the illegal dissemination of trade sensitive information in violation of any law or regulation.

It is noted that the other proposed rule referred to by the commenter, which was published in the Federal Register (58 FR 44476) on August 23, 1993, and did address certain disclosure matters, has recently been adopted as a final rule (T.D. 98–21, *supra).*

CONCLUSION

In view of the foregoing, and following careful consideration of the issues raised by the commenter and further review of the matter, Customs has concluded that the proposed amendments with the modifications discussed above should be adopted.

ADDITIONAL CHANGES

In addition, Customs has determined to change § 151.16(c) to make clear that issuance of a notice of detention is not a final determination so as to permit the filing of a protest pursuant to 19 U.S.C. 1514(a)(4). Proposed § 151.16(e), redesignated as § 151.16(j) for editorial clarity, is revised regarding seizure and forfeiture to allow Customs to deny entry or allow exportation of detained merchandise where authorized by law, with the importer responsible for paying all expenses of exportation. Proposed paragraphs (f) and (g) of § 151.16, redesignated as paragraphs (e) and (f) in this document, respectively, are changed to remove any references that would have allowed the importer or interested party to extend the time Customs has to issue a final determination with respect to detained merchandise. Customs has determined that the importer may, without the necessity of asking for an extension of time, bring the merchandise into compliance thereby lifting the detention or file a protest based upon Customs failure to issue a final determination. In this latter regard, the term "decision" in proposed § 151.16(f), redesignated as § 151.16(e) is changed to "determination", for purposes of editorial consistency with redesignated § 151.16(f). Section 151.16(e) is further revised to provide that a final determination thereunder may be the subject of a protest.

In order to bring consistency to the regulations with regard to the disallowance of any extension of time which Customs has to issue a final

determination to exclude merchandise, § 174.21(b), Customs Regulations (19 CFR 174.21(b)) is amended by removing the provision which allowed for delay in issuance of a decision on a protest relating to the deemed exclusion of merchandise (at the protestant's request) insofar as that provision of the regulations is inconsistent with the provisions of 19 U.S.C. 1499(c)(5)(B).

In order to clarify the time period in which a protestant has to commence a civil action in the Court of International Trade in response to a deemed denial of a protest, Customs has amended § 174.31 by adding a new paragraph (c) to indicate that a civil action must be filed within 180 days after the date that a protest is deemed denied under proposed § 151.16(h), which is redesignated as § 151.16(g). Customs has also added the phrase "for purposes of 28 U.S.C. 1581" to §§ 151.16(g) and 174.21(b) to further clarify this change.

Regulatory Flexibility Act and Executive Order 12866

This final rule document accurately reflects recent amendments to statutory law, enacted as part of the Mod Act. These amendments essentially constitute a codification of existing and longstanding Customs practice with regard to the examination and detention of imported merchandise. As such, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.),* it is certified that this rule does not have a significant economic impact on a substantial number of small entities. Thus, the rule is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 or 604. Nor does the rule result in a "significant regulatory action" under E.O. 12866.

Paperwork Reduction Act

The collection of information contained in this final rule has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1515–0210. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The collection of information in this final rule is contained in § 151.16(d). This information is necessary and will be used to determine the admissibility of imported merchandise and to otherwise comply with the requirements of the Mod Act and protect the revenue. The likely respondents and/or recordkeepers are businesses or other for-profit institutions.

The estimated average annual burden associated with this collection is 2 hours per respondent or recordkeeper.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503. A copy should also be sent to the Regulations Branch,

Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., 3rd Floor, Washington, D.C. 20229.

LIST OF SUBJECTS

19 CFR Part 151

Customs duties and inspection, Examination, Sampling and testing, Imports, Laboratories, Penalties, Reporting and recordkeeping requirements.

19 CFR Part 174

Administrative practice and procedure, Customs duties and inspection, Reporting and recordkeeping requirements.

19 CFR Part 178

Administrative practice and procedure, Collections of information, Paperwork requirements, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

Accordingly, parts 151, 174, and 178, Customs Regulations (19 CFR parts 151, 174, and 178), are amended as set forth below.

PART 151—EXAMINATION, SAMPLING AND TESTING OF MERCHANDISE

1. The general authority citation for part 151, and the specific authority for subpart A, continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Notes 20 and 21, Harmonized Tariff Schedule of the United States), 1624. Subpart A also issued under 19 U.S.C. 1499.

* * * * * * *

2. Part 151 is amended by adding a new § 151.16 to read as follows:

§ 151.16 Detention of merchandise.

(a) *Exemptions from applicability.* The provisions of this section are not applicable to detentions effected by Customs on behalf of other agencies of the U.S. Government in whom the determination of admissibility is vested and to detentions arising from possibly piratical copies (see part 133, subpart E, of this chapter) or import of goods bearing marks which are confusingly similar to recorded trademarks or restricted gray market merchandise (see part 133, subpart C, of this chapter.)

(b) *Decision to detain or release.* Within the 5-day period (excluding weekends and holidays) following the date on which merchandise is presented for Customs examination, Customs shall decide whether to release or detain merchandise. Merchandise which is not released within such 5-day period shall be considered to be detained merchandise. For purposes of this section, merchandise shall be considered to be presented for Customs examination when it is in a condition to be viewed and examined by a Customs officer. Mere presentation to the examining of-

ficer of a cargo van, container or instrument of international traffic in which the merchandise to be examined is contained will not be considered to be presentation of merchandise for Customs examination for purposes of this section. Except when merchandise isv examined at the public stores, the importer shall pay all costs relating to the preparation and transportation of merchandise for examination.

(c) *Notice of detention*. If a decision to detain merchandise is made, or the merchandise is not released within the 5-day period, Customs shall issue a notice to the importer or other party having an interest in such merchandise no later than 5 days (excluding weekends and holidays) after such decision or failure to release (see paragraph (b) of this section). Issuance of a notice of detention is not to be construed as a final determination as to admissibility of the merchandise. The notice shall be prepared by the Customs officer detaining the merchandise and shall advise the importer or other interested party of the:

(1) Initiation of the detention, including the date the merchandise was presented for examination;

(2) Specific reason for the detention;

(3) Anticipated length of the detention;

(4) Nature of the tests or inquiries to be conducted; and

(5) Nature of any information which, if supplied to the Customs Service, may accelerate the disposition of the detention.

(d) *Providing testing results*. Upon written request by the importer or other party having an interest in detained merchandise, Customs shall provide copies of the results of any testing conducted on the merchandise together with a description of the testing procedures and methodologies used (unless such procedures or methodologies are proprietary to the holder of a copyright or patent or were developed by Customs for enforcement purposes). The results and test description shall be in sufficient detail to permit the duplication and analysis of the testing and the results.

(e) *Final determinations*. A final determination with respect to admissibility of detained merchandise will be made within 30 days from the date the merchandise is presented for Customs examination. Such a determination may be the subject of a protest.

(f) *Effect of failure to make a determination*. The failure by Customs to make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented for Customs examination, or such longer period if specifically authorized by law, shall be treated as a decision by Customs to exclude the merchandise for purposes of section 514(a)(4) of the Tariff Act of 1930, as amended (19 U.S.C. 1514(a)(4)). Such a deemed exclusion may be the subject of a protest.

(g) *Failure to decide protest*. If a protest which is filed as a result of a final determination or a deemed exclusion of detained merchandise is not allowed or denied in whole or in part before the 30th day after the

day on which the protest was filed, it shall be treated as having been denied on such 30th day for purposes of 28 U.S.C. 1581.

(h) *Decision before commencement of court action.* Customs may at any time after a deemed denial of a protest as provided in paragraph (g) of this section, but before commencement of a court action as provided in paragraph (i) of this section, grant a protest and permit release of detained merchandise, or deny a protest in accordance with § 174.30 of this chapter.

(i) *Commencement of court action; burden of proof and decisions of the court.* Once a court action respecting a detention is commenced, unless Customs establishes by a preponderance of the evidence that an admissibility decision has not been reached for good cause, the court shall grant the appropriate relief which may include, but is not limited to, an order to cancel the detention and release the merchandise.

(j) *Seizure and forfeiture; denial of entry or exportation.* If otherwise provided by law, detained merchandise may be seized and forfeited. In lieu of seizure and forfeiture, where authorized by law, Customs may deny entry and permit the merchandise to be exported, with the importer responsible for paying all expenses of exportation.

PART 174—PROTESTS

1. The general authority citation for part 174 continues to read as follows, and a specific sectional authority citation for § 174.21 is added to read as follows:

Authority: 19 U.S.C. 66, 1514, 1515, 1624.

Section 174.21 also issued under 19 U.S.C. 1499.

2. Section 174.21 is amended by revising paragraph (b) to read as follows:

§ 174.21 Time for review of protests.

* * * * * * *

(b) *Protests relating to exclusion of merchandise.* If the protest relates to an administrative action involving exclusion of merchandise from entry or delivery under any provision of the Customs laws, the port director shall review and act on a protest filed in accordance with section 514(a)(4), Tariff Act of 1930, as amended (19 U.S.C. 1514(a)(4)), within 30 days from the date the protest was filed. Any protest filed pursuant to this paragraph shall clearly so state on its face. Any protest filed pursuant to this paragraph which is not allowed or denied in whole or in part before the 30th day after the day on which the protest was filed shall be treated as having been denied on such 30th day for purposes of 28 U.S.C. 1581.

3. Section 174.31 is amended by removing the word "or" following the comma at the end of paragraph (a); by removing the period at the end of paragraph (b), and adding a comma in its place, followed by the word "or"; and by adding a new paragraph (c) thereafter to read as follows:

§ 174.31 Judicial review of denial of protest.

* * * * * * *

(c) The date that a protest is deemed denied in accordance with § 174.21(b), or § 151.16(g) of this chapter.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for part 178 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1624; 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by adding a new listing to the table in numerical order to read as follows:

§ 178.2 Listing of OMB control numbers.

19 CFR Section	*Description*	*OMB Control No.*
*	*	*
§ 151.16(d))	Detention of merchandise	1515–0210
*	*	*

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: July 8, 1999.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, August 11, 1999 (64 FR 43608)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 11, 1999.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED MODIFICATION AND REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF ELECTRIC/BATTERY POWERED DOMESTIC HEAT SEALING DEVICES

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed modification and revocation of tariff classification ruling letters and treatment relating to the classification of electric/battery powered, heat sealing devices which reseal plastic bags to preserve freshness of food or other contents.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling and revoke another ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of electric/battery powered, heat sealing devices which reseal plastic bags to preserve freshness of food or other contents. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical transactions. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before September 24, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: General Classification Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 927–2318.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI , this notice advises interested parties that Customs intends to revoke one ruling and modify another ruling relating to the tariff classification of electric/battery powered, heat sealing devices which reseal plastic bags to preserve freshness of food and other contents. Although in this notice Customs is specifically referring to New York Ruling Letters (NYs) 882256 and 886927, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to those identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other

reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to this notice.

In NY 882256, dated February 10, 1993, and NY 886927, dated June 18, 1993, respectively, a lightweight, cordless, battery-powered device used primarily in the home to seal plastic bags by the application of heat, and "impulse bag sealers"—electrical devices used to seal the ends of a plastic bag by manually pressing down a handle containing a heated electrical filament, were classified as other electric welding machines and apparatus under subheading 8515.80.00, HTSUS. NY 882256 is set forth as "Attachment A" to this document, and NY 886927 is set forth as "Attachment B" to this document.

It is now Customs position that this merchandise is classifiable under subheading 8516.79.00, HTSUS, which provides for other electro-thermic appliances used for domestic purposes, or, in instances where such heat sealing devices are not intended for domestic or household use, in subheading 8543.89.96, HTSUS, as other electrical machines and apparatus not specified or included within Chapter 85. Proposed HQ 962014 modifying NY 886927 is set forth as "Attachment C" to this document, and proposed HQ 962015 revoking NY 882256 is set forth as "Attachment D" to this document.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY 882256 and to modify NY 886927, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed HQs 962014 and 962015, *supra*. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 4, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, February 10, 1993.

CLA-2-85:S:N:N1:105 882256
Category: Classification
Tariff No. 8515.80.0080

MR. SHELDON STONE
ETA IMPORT & EXPORT, LTD.
1 Cross Island Plaza
Jamaica, NY 11422

Re: The tariff classification of a sealer from China.

DEAR MR. STONE:

In your letter dated January 25, 1993 you requested a tariff classification ruling on behalf of E. Mishan and Sons, Inc. The sample is being returned as requested.

The sealer is lightweight, cordless and is powered by four size AA batteries. It is used primarily in the home to seal plastic bags by the application of heat.

The applicable subheading for the sealer will be 8515.80.0080, Harmonized Tariff Schedule of the United States (HTS), which provides for other electric welding machines and apparatus. The rate of duty will be 2 percent ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, June 18, 1993.

CLA-2-84:S:N:N1:103 886927
Category: Classification
Tariff No. 8515.80.0080, 8422.30.9090, 8422.40.9080, and 8422.30.9070

MR. WILLIAM J. DU
KING STAR INTERNATIONAL, INC.
8 Vista Road
Wellesley, MA 02181

Re: The tariff classification of packaging equipment from China.

DEAR MR. DU:

In your letter dated May 26, 1993 you requested a tariff classification ruling.

Along with your request you submitted brochures which briefly described several articles used for packaging products. Your inquiry concerned the following specific articles:

1. PFS-200 and PFS-300 Impulse Bag Sealers--electrical devices used to seal closed the ends of a plastic bag by manually pressing down a handle containing a heated electrical filament.

2. DBF-900 Continuous Bag Sealer—a machine which simultaneously seals, prints a label, and counts plastic and other heat sealable bags.

3. SP3594 Skin Packaging Machine—a machine which heats plastic film and vacuum seals the film around a carded product to produce a blister package.

4. DZQ 400/2SB and DZQ 600/2SC Vacuum Aeration Packaging Machines—machines containing two stainless steel vacuum chambers for simultaneous vacuum, aeration, sealing, label printing, and counting of food products, medicinals, and the like.

5. FX500–1 Case Tape Sealer—a machine which applies plastic or paper tape to the flaps of a carton in order to seal it closed.

6. BS–400 Shrink Wrapping Machine—a machine which shrinks plastic film around a package in order to seal it.

The applicable subheading for the PFS–200 and PFS–300 Impulse Bag Sealers will be 8515.80.0080, Harmonized Tariff Schedule of the United States (HTS), which provides for electric * * * welding machines and apparatus, whether or not capable of cutting: other machines and apparatus: other. The rate of duty will be 2 percent ad valorem.

The applicable subheading for the DBF–900 Continuous Bag Sealer and the FX500–1 Case Tape Sealer will be 8422.30.9090, HTS, which provides for machinery for filling, closing, sealing, capsuling or labeling boxes, bags or similar containers: other. The rate of duty will be 3.6 percent ad valorem.

The applicable subheading for the SP3954 Skin Packaging Machine and the BS–400 Shrink Wrapping Machine will be 8422.40.9080, HTS, which provides for other packing or wrapping machinery: other: other. The rate of duty will be 3.6 percent ad valorem.

Finally, the applicable subheading for the DZQ 400/2SB and DZQ 600/2SC Vacuum Aeration Packaging Machines will be 8422.30.9070, HTS, which provides for machinery for filling, closing, sealing, capsuling or labeling bottles, cans or similar containers: other. The rate of duty will again be 3.6 percent ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 962014:AML
Category: Classification
Tariff No. 8543.89.96

MR. WILLIAM J. DU
KING STAR INTERNATIONAL, INC.
581 Boylston Street
Suite 702BC
Boston, MA 02116

Re: Electric powered heat-sealing product; NY 886927 modified.

DEAR MR. DU:

This is in reference to New York Ruling Letter (NY) 886927, issued to you on June 13, 1993, by the Customs National Commodity Specialist Division, New York, in which, among other items not herein relevant, the PFS–200 and PFS–300 impulse bag sealers—electrical devices used to seal/close the ends of a plastic bag by manually pressing down a handle containing a heated electrical filament, were classified under subheading 8515.80.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for electric * * * welding machines and apparatus, whether or not capable of cutting: other machines and apparatus: other. We have reviewed that ruling and determined that the classification set forth is partially in error.

Facts:

The relevant articles in NY 886927 were described as the PFS–200 and PFS–300 impulse bag sealers—electrical devices used to seal/close the ends of a plastic bag by manually pressing down a handle containing a heated electrical filament. Further information was requested from the importer and provided in April, 1999.

The electric/battery powered heat sealing product roughly resembles a large paper cutter, with a thick base and large handle (instead of the paper-cutting blade) which operates by depressing the arm as one would a paper cutter. The PFS–200 and PFS–300 are constructed of cast iron or steel and are marketed to supermarkets and restaurants. When the interior surface of the hinged arm portion and the inner surface of the base make contact, heat is produced. The article is a product which uses micro-thermal technology to create an airtight seal of plastic bags to keep and preserve unused portions of food stored inside the bags.

Issue:

Whether the product is classified under subheading 8422.30.90, HTSUS, as other machinery for sealing bags; or subheading 8515.80.00, HTSUS, as electric * * * welding machines and apparatus, whether or not capable of cutting: other machines and apparatus: other; or subheading 8516.79.00, HTSUS, as other electrothermic appliances of a kind used for domestic purposes; or subheading 8543.89.96, HTSUS, which provides for other electrical machines and apparatus, having individual functions, not specified or included elsewhere in Chapter 85?

Law and Analysis:

Classification of imported merchandise is accomplished pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). Classification under the HTSUS is guided by the General Rules of Interpretation of the Harmonized System (GRIs). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]"

The HTSUS headings and subheadings under consideration are as follows:

8422	Dishwashing machines; machinery for cleaning or drying bottles or other containers; machinery for filling, closing, sealing or labeling bottles, cans, boxes, bags or other containers; machinery for capsuling bottles, jars, tubes and similar containers; other packing or wrapping machinery (including heat-shrink wrapping machinery); machinery for aerating beverages; parts thereof:
8422.30	Machinery for filling, closing, sealing or labeling bottles, cans, boxes, bags or other containers; machinery for capsuling bottles, jars, tubes and similar containers; machinery for aerating beverages:
8422.30.90	Other.
* * * * * * *	
8515	Electric (including electrically heated gas), laser or other light or photon beam, ultrasonic, electron beam, magnetic pulse or plasma arc soldering, brazing or welding machines and apparatus, whether or not capable of cutting; electric machines and apparatus for hot spraying of metals or cermets; parts thereof:
8515.80.00	Other machines and apparatus.
* * * * * * *	
8516	Electric instantaneous or storage water heaters and immersion heaters; electric space heating apparatus and soil heating apparatus; electro-thermic hair-dressing apparatus (for example, hair dryers, hair curlers, curling tong heaters) and hand dryers; electric flatirons; other electro-thermic appliances of a kind used for domestic purposes; electric heating resistors, other than those of heading 8545; parts thereof:
	Other electrothermic appliances:
8516.79.00	Other.
* * * * * * *	

8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:
8543.89	Other:
	Other:
8543.89.96	Other.

The Harmonized Commodity Description And Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Initially we will determine whether the article is a mechanical device of Chapter 84, HTSUS, or electrical machinery of Chapter 85, HTSUS. The General EN to Chapter 84 (page 1233) states, in regard to the general content of the chapter:

> Subject to the provisions of the General Explanatory Note to Section XVI, this Chapter covers all machinery and mechanical appliances, and parts thereof, not more specifically covered by Chapter 85 * * * In general, Chapter 84 covers machinery and mechanical apparatus and Chapter 85 electrical goods * * *.

The only mechanical aspect in the articles is the paper cutter-like arm and hinge which facilitates the compression and union of the heat producing ends of the article. It is the electric aspect of the article which enables it to perform its function: heating bags to seal them. Therefore, pursuant to the General ENs for Chapter 84, we conclude that the article is not machinery for sealing bags or other containers of heading 8422, HTSUS.

Within Chapter 85, the competing headings are heading 8516, which provides for other electrothermic appliances of a kind used for domestic purposes, heading 8515, which provides for welding machines and apparatus, and heading 8543, which provides for electrical machines and apparatus, having individual functions, not specified or included elsewhere in Chapter 85. EN 85.15, page 1466, describes the machines and apparatus of that heading (*e.g.*, **[b]razing or soldering machines and apparatus** * * * in which metal parts are joined * * * [;] **[m]achines and apparatus for resistance welding of metal [;] [m]achines and apparatus for arc or plasma arc welding of metals** * * *). Clearly these exemplars are not at all of the kind of the electrothermic device under consideration, which is incapable of generating the heat or other energy to perform the kind of welding in the exemplars.

EN 85.16 at page 1470 describes products which are classifiable pursuant to the heading and basic criteria for making such a determination. EN 85.16(E) states that "[t]his group includes all electro-thermic machines and appliances **provided** they are **normally used in the household** [emphasis in original]." We note that the provision for other electrothermic appliances of a kind used for domestic purposes in heading 8516 is governed by use (see *Group Italglass, U.S.A., Inc. v. United States*, 17 CIT 226 (1993)). The articles, by their size, weight and construction, are not intended for domestic (in the household) use. Rather, the PFS–200 and PFS–300 are designed as commercial sealers for mass production or food preservation in a larger, *e.g.*, food service industry or restaurant, scale. Commercial sealers, such as those at issue, are of greater durability and larger capacity than those for domestic use and are marketed and made available for use in the commercial setting. Therefore, the articles may not be classified in heading 8516 as other electrothermic appliances of a kind used for *domestic purposes*, and classification falls to the residual provision for electrical machines and apparatus, in heading 8543, HTSUS.

Holding:

The articles are classifiable under subheading 8543.89.96, HTSUS, as other electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter.

Effect on Other Rulings:

NY 886927 is **modified** with regard to the classification of the PFS–200 and the PFS–300 impulse bag sealers.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 962015:AML
Category: Classification
Tariff No. 8516.79.00

MR. SHELDON STONE
ETA IMPORT & EXPORT, LTD.
1 Cross Island Plaza
Jamaica, NY 11422

Re: Electric/battery powered heat-sealing product; NY 882256 revoked.

DEAR MR. STONE:

This is in reference to New York Ruling Letter (NY) 882256, issued to you on behalf of E. Mishan and Sons, Inc., on February 10, 1993, by the Customs National Commodity Specialist Division, New York, in which an electric/battery powered heat sealing product was classified under subheading 8515.80.0080, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other electric * * * welding machines and apparatus. We have reviewed that ruling and determined that the classification set forth is in error.

Facts:

The heat sealer in NY 882256 was described as "lightweight," "cordless," "powered by four size AA batteries" and as "being used primarily in the home to seal plastic bags by the application of heat." Generally, electric/battery powered heat sealing products roughly resemble a stapler, with a thick base and hinged handle which operates by depressing the end as one would a stapler. When the ends make contact, heat is produced in the range of 400–550 degrees Fahrenheit. The article is a household product which uses micro-thermal technology to create an airtight seal of plastic bags to keep and preserve unused portions of food stored inside the bags.

Issue:

Whether the product is classified under subheading 8422.30.90, HTSUS, as other machinery for sealing bags; subheading 8515.80.00, HTSUS, as other electric welding machines and apparatus; or subheading 8516.79.00, HTSUS, as other electrothermic appliances of a kind used for domestic purposes?

Law and Analysis:

Classification of imported merchandise is accomplished pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). Classification under the HTSUS is guided by the General Rules of Interpretation of the Harmonized System (GRIs). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]"

The HTSUS headings and subheadings under consideration are as follows:

8422	Dishwashing machines; machinery for cleaning or drying bottles or other containers; machinery for filling, closing, sealing or labeling bottles, cans, boxes, bags or other containers; machinery for capsuling bottles, jars, tubes and similar containers; other packing or wrapping machinery (including heat-shrink wrapping machinery); machinery for aerating beverages; parts thereof:
8422.30	Machinery for filling, closing, sealing or labeling bottles, cans, boxes, bags or other containers; machinery for capsuling bottles, jars, tubes and similar containers; machinery for aerating beverages:
8422.30.90	Other.

* * * * * * *

8515	Electric (including electrically heated gas), laser or other light or photon beam, ultrasonic, electron beam, magnetic pulse or plasma arc soldering, brazing or welding machines and apparatus, whether or not capable of cutting; electric machines and apparatus for hot spraying of metals or cermets; parts thereof:
8515.80.00	Other machines and apparatus.

* * * * * * *

8516	Electric instantaneous or storage water heaters and immersion heaters; electric space heating apparatus and soil heating apparatus; electro-thermic hair-dressing apparatus (for example, hair dryers, hair curlers, curling tong heaters) and hand dryers; electric flatirons; other electro-thermic appliances of a kind used for domestic purposes; electric heating resistors, other than those of heading 8545; parts thereof:
	Other electrothermic appliances:
8516.79.00	Other.

The Harmonized Commodity Description And Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Initially we will determine whether the article is a mechanical device of Chapter 84, HTSUS, or electrical machinery of Chapter 85, HTSUS. The General EN to Chapter 84 (page 1233) states, in regard to the general content of the chapter:

> Subject to the provisions of the General Explanatory Note to Section XVI, this Chapter covers all machinery and mechanical appliances, and parts thereof, not more specifically covered by Chapter 85 * * * In general, Chapter 84 covers machinery and mechanical apparatus and Chapter 85 electrical goods * * *.

To the extent that the exceptions described in the ENs to these general rules are applicable to the merchandise under consideration, they indicate that domestic electromechanical appliances are classified in Chapter 85. The only mechanical aspect in the articles is the staple-like hinge which facilitates the compression and union of the heat producing ends of the article. It is the electric aspect of the article which enables it to perform its function: heating bags to seal them. Therefore, pursuant to the General ENs for Chapter 84, we conclude that the article is not machinery for sealing bags or other containers of heading 8422, HTSUS (see also Note 1(e), Chapter 84, HTSUS, which excludes from classification in Chapter 84 "electromechanical domestic devices of heading of 8509;" although the article is precluded from classification in subheading 8509 because it does not have a "self-contained electric motor," Note 1(e) of Chapter 84 supports the exclusion of the article from Chapter 84 as a domestic electric device with only a minor mechanical aspect).

Within Chapter 85, the competing headings are heading 8515, which provides for welding machines and apparatus, and heading 8516, which provides for other electrothermic appliances of a kind used for domestic purposes. EN 85.15, page 1466, describes the machines and apparatus of that heading (*e.g.*, **[b]razing or soldering machines and apparatus** * * * in which metal parts are joined * * * [;] **[m]achines and apparatus for resistance welding of metal [;] [m]achines and apparatus for arc or plasma arc welding of metals** * * *). Clearly these exemplars are not at all of the kind of the domestic electrothermic device under consideration, which is incapable of generating the heat or other energy to perform the kind of welding in the exemplars.

EN 85.16 at page 1470 describes products which are classifiable pursuant to the heading and basic criteria for making such a determination. EN 85.16(E) states that "[t]his group includes all electro-thermic machines and appliances **provided** they are **normally used in the household** [emphasis in original]." We note that the provision for other electrothermic appliances of a kind used for domestic purposes in heading 8516 is governed by use (see *Group Italglass, U.S.A., Inc. v. United States*, 17 CIT 226 (1993)). The article, by its size, weight and construction, is intended for use in the household. The article is primarily used in the home, in order to preserve food products ordinarily consumed in the home. Therefore, the criteria established are satisfied and the product will be classified accordingly.

Holding:

The article is classifiable under subheading 8516.79.00, HTSUS, as an other electrothermic appliance of a kind used for domestic purposes.

Effect on Other Rulings:

NY 882256 is **revoked**.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Nicholas Tsoucalas

R. Kenton Musgrave

[PUBLIC VERSION]

(Slip Op. 99–57)

TAIWAN SEMICONDUCTOR INDUSTRY ASSOCIATION, ET AL., PLAINTIFFS, AND MOTOROLA, INC., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR

Court No. 98–05–01460

[The International Trade Commission's affirmative material injury determination is remanded.]

(Decided June 30, 1999)

White & Case, LLP (Christopher F. Corr, Richard G. King, and *Amy E. Farrell)* for Plaintiffs.

Covington & Burling (Harvey M. Applebaum) for Plaintiff-Intervenor.

Lyn M. Schlitt, General Counsel; *James A. Toupin*, Deputy General Counsel; *Michael Diehl*, Office of the General Counsel, U.S. International Trade Commission, for Defendant.

Hale and Dorr LLP (Gilbert B. Kaplan, Michael D. Esch, Paul W. Jameson, and *Cris R. Revaz)* for Defendant-Intervenor.

OPINION

POGUE, *Judge:* This action is before the Court on Plaintiffs' motion for judgment on the agency record pursuant to USCIT Rule 56.2. Taiwan Semiconductor Industry Association; Taiwan Semiconductor Manufacturing Company, Ltd.; Winbond Electronics Corporation; Alliance Semiconductor Corporation; Galvantech, Inc.; and Integrated Silicon Solution, Inc. (collectively, "Plaintiffs") seek review of the final determination of the U.S. International Trade Commission ("Commission") in *Static Random Access Memory Semiconductors from the Republic of Korea and Taiwan*, Inv. Nos. 731–TA–761 & 762 (Final)(List 2, Doc. 395)(Apr. 9, 1998)("Final Determination").[1] Specifically, Plaintiffs chal-

[1] List 1 consists of the documents within the public portion of the record made before the Commission. List 2 consists of the documents within the confidential portion of the same record.

lenge the Commission's determination that the industry in the United States producing static random access memory semiconductors ("SRAMs") is materially injured by reason of imports from Taiwan that are sold at less than fair value ("LTFV"). The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c)(1994).

BACKGROUND

SRAMs are integrated circuits containing thousands or millions of cells that allow data to be stored and retrieved at high speeds. Unlike dynamic random access memory semiconductors ("DRAMs"), SRAMs are capable of retaining their information without the need for periodic electrical "refresh," and therefore, they generally consume less power than DRAMs. Moreover, SRAMs are more complex in design than DRAMs and are more difficult to manufacture. SRAMs come in a variety of sizes, process technologies, classifications, designs, and access speeds, and have two basic uses, serving as: 1) main memory in such products as hand-held cellular phones, portable computers, fax copiers, and modems, and 2) intermediate—or "cache"—memory in computer systems.

On February 25, 1997, Micron Technology filed a petition with the Commission and the Department of Commerce alleging that an industry in the United States was materially injured or threatened with material injury by reason of LTFV SRAMs imported from Korea and Taiwan. The Department of Commerce found that the Korean and Taiwanese SRAMs were being sold in the United States at LTFV. *See Static Random Access Memory Semiconductors From the Republic of Korea*, 63 Fed. Reg. 8,934 (Dep't Commerce, Feb. 23, 1998)(final determ.); *Static Random Access Memory Semiconductors From Taiwan*, 63 Fed. Reg. 8,909, 8,910 (Dep't Commerce, Feb. 23, 1998)(final determ.). Thereafter, the Commission made a negative material injury determination concerning the Korean imports and an affirmative material injury determination regarding the Taiwanese imports. *See* Final Determination at 3.

Only two commissioners participated in the final injury determination regarding SRAMs from Taiwan. *See* Final Determination at 33, n.168. Vice-Chairman Lynn M. Bragg found that the U.S. industry was materially injured by LTFV imports of SRAMs from Taiwan, with Chairman Marcia E. Miller dissenting. Vice-Chairman Bragg's decision was deemed to be an affirmative determination of the Commission pursuant to section 771(11) of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1677(11)(1994). Thus, hereafter, the Court will simply refer to Vice-Chairman Bragg's decision as the Commission's determination.

In sum, the Commission found that a price collapse caused material injury to the U.S. SRAM industry, and that "the subject imports from Taiwan contributed to and exacerbated the price collapse to a significant degree[.]" Final Determination at 37.

STANDARD OF REVIEW

In reviewing the Commission's determination, the Court must sustain a final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i)(1994).

DISCUSSION

A. Material Injury "By Reason Of" LTFV Imports

The statute directs the Commission to "make a final determination of whether * * * an industry in the United States * * * is materially injured * * * by reason of [the subject] imports[.]" 19 U.S.C. § 1673d(b)(1994). In *Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997), the Court of Appeals for the Federal Circuit ("Federal Circuit") held that the "by reason of" standard "mandates a showing of causal—not merely temporal—connection between the [subject imports] and the material injury." 132 F.3d at 720. The standard "requires adequate evidence to show that the harm occurred 'by reason of' the [subject] imports, not by reason of a minimal or tangential contribution to material harm * * *." *Id.* at 722.

In examining the causal nexus between the subject imports and the material injury, the Commission is required by 19 U.S.C. § 1677(7)(B) to consider three factors: "1) the volume of [the subject] imports, 2) the effect of [the subject] imports on prices of like domestic products, and 3) the impact of [the subject] imports on domestic producers of like products." *USX Corp. v. United states*, 11 CIT 82, 84, 655 F. Supp. 487, 489 (1987).[2]

The Commission evaluates the volume and price effects of the subject imports and their consequent impact on the domestic industry by applying the standards set forth in 19 U.S.C. § 1677(7)(C).[3] *See U.S. Steel*

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[2] In addition, the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii)(1994).

[3] The relevant portions state:

> (i) Volume
> In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.
>
> (ii) Price
> In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—
>
> (I) there has been significant price underselling by the imported merchandise as compared with the price of like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.
>
> (iii) Impact on affected domestic industry
> In examining the impact required to be considered under subparagraph (B)(i)(iii), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices,
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (V) in a proceeding under subtitle B[19 U.S.C. §§ 1673–1673h], the magnitude of the margin of dumping.
>
> The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C).

Group v. United States, 96 F.3d 1352, 1360 (Fed. Cir. 1996); *see also* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping) at Art. 3.1 ("Antidumping Agreement")("A determination of injury * * * shall * * * involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.").

More specifically, the statute directs the Commission to evaluate: 1) whether the volume of the subject imports is significant; 2) whether price underselling by the subject imports is significant and whether domestic price depression or suppression caused by the subject imports is significant; and 3) the impact on the domestic industry. *See* 19 U.S.C. § 1677(7)(C). In assessing the third factor, impact, the Commission evaluates the bearing of the volume and price effects on the domestic industry, *see, e.g.*, *Timken Co. v. United States*, 20 CIT 76, 89, 913 F. Supp. 580, 591 (1996), and routinely determines whether the adverse impact is significant as well. *See, e.g.*, *Angus Chemical Co. v. United States*, 140 F.3d 1478, 1482 (Fed. Cir. 1998).

Thus, after assessing whether the volume, price effects, and impact of the subject imports on the domestic industry are significant,[4] the statutory "by reason of" language implicitly requires the Commission to "determine whether these factors as a whole indicate that the [subject] imports themselves made a material contribution to the injury." *Gerald Metals, Inc. v. United States*, 22 CIT ____, ____ 27 F. Supp.2d 1351, 1355 (1998), *appeal dismissed for appellant's failure to prosecute in accordance with Federal Circuit Rule 31(a)*, No. 99–1166 (Fed. Cir. Apr. 16, 1999);[5] *cf. U.S. Steel Group v. United States*, 18 CIT 1190, 1211–12, 873 F. Supp. 673, 694 (1994)(declining to extend the causation test propagated by the court in *British Steel Corp. v. United States*, 8 CIT 86, 593 F. Supp. 504 (1984), which held that "[t]he statute's causation prerequisite to an affirmative determination is satisfied if the * * * imports contribute, even minimally, to the conditions of the domestic industry[.]" 8 CIT at 96, 593 F. Supp. at 413), *aff'd*, 96 F.3d 1352 (Fed. Cir. 1996). *But see Grupo Industrial Camesa v. United States*, 18 CIT 461, 465, 853 F. Supp. 440, 444 (1994)(relying on *British Steel*'s minimal contribution test), *aff'd*, 85 F.3d 1577 (Fed. Cir. 1996); *Pasco Terminals, Inc. v. United States*, 83 Cust. Ct. 65, 88, 477 F. Supp. 201, 220–21 (1979)(holding that it was sufficient that the subject imports "contributed to the general de-

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[4] The Court notes that the presence or absence of any factor is not dispositive to a finding of material injury. *See* 19 U.S.C. § 1677(7)(E)(ii). Moreover, the Commission has discretion to weigh the significance of each factor in light of the circumstances. *See Iwatsu Electric Co., Ltd. v. United States*, 15 CIT 44, 49, 758 F. Supp. 1506, 1510–11 (1991).

[5] Following the Federal Circuit's decision in *Gerald Metals*, 132 F.3d 716, this Court ordered the Commission to reconsider its affirmative material injury determination concerning imports of pure magnesium from the Ukraine. *See Gerald Metals*, 22 CIT ___, slip op. 98–56 (April 28, 1998). This Court then sustained the Commission's subsequent remand determination in *Gerald Metals*, 22 CIT ___, 27 F. Supp.2d 1351 (1998).

pression of prices and to market disruption"), *aff'd*, 634 F.2d 610 (C.C.P.A. 1980).[6]

"Therefore, proper adherence to the causation analysis incorporated in the statute prevents the Commission from finding material injury by reason of [the subject] imports where their contribution to the overall harm is *de minimis* (e.g., minimal or tangential)." *Gerald Metals*, 22 CIT at ___, 27 F. Supp.2d at 1356.[7]

Although in *Gerald Metals* this Court specifically interpreted the statute as it existed prior to the enactment of the Uruguay Round Agreements Act ("URAA") on January 1, 1995, this Court has deemed that the "by reason of" standard articulated therein is applicable to the amended statute. *See NEC Corp. v. Dep't of Commerce*, 22 CIT ___, ___, 36 F. Supp.2d 380, 391–93 (1998); *Goss Graphics System, Inc. v. United States*, 22 CIT ___, ___, 33 F. Supp.2d 1082, 1089–90 (1998), *appeal docketed*, No. 99–1150 (Fed. Cir. Dec. 11, 1998). The URAA did not change the relevant statutory language, and the Statement of Administrative Action to the URAA expressly states that the causation analysis under the old statute is consistent with the URAA. *See* SAA at 851. Therefore, the "by reason of" standard applies under the URAA.

Moreover, the plain language of the SAA is consistent with this Court's holding in *Gerald Metals* that the Commission must determine whether the statutory factors as a whole indicate that the subject imports themselves made a material contribution to the overall injury. *See* SAA at 851–52. The SAA clarifies that "the Commission *must* examine other factors to ensure that it is not attributing injury from other sources to the subject imports." *Id.* (emphasis added).

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[6] The Federal Circuit's opinion in *Gerald Metals* was not *en banc*. The Court recognizes the general rule that, where there is "an apparent conflict in statements of Federal Circuit law, the earlier statement prevails unless or until it has been overruled in banc [sic]." *YBM Magnex, Inc. v. Int'l Trade Comm'n*, 145 F.3d 1317, 1319 n.2 (Fed. Cir. 1998)(citation omitted). Nevertheless, while the Federal Circuit in *Camesa* and its predecessor in *Pasco* affirmed lower court decisions that applied a minimal contribution requirement, neither court itself expressed an endorsement of such a standard. *See Camesa*, 85 F.3d 1577; *Pasco*, 634 F.2d 610. In fact, in *Camesa*, the Federal Circuit implies the opposite. *See Camesa*, 85 F.3d at 1581 (stating that "the Commission must determine that imported merchandise which is being sold * * * at less than fair value is *materially* injuring * * * [the] domestic industry")(emphasis added). While a Federal Circuit decision that is not *en banc* cannot change the law as established in prior rulings, "[s]ubsequent panel opinions may elaborate and refine and thus advance the evolution of judge-made law[.]" *YBM Magnex*, 145 F.3d at 1319 n.2. The Federal Circuit in *Gerald Metals* clarified that "the statute requires adequate evidence to show that the harm occurred 'by reason of' the LTFV imports, not by reason of a minimal or tangential contribution to material harm caused by LTFV goods." *Gerald Metals*, 132 F.3d at 722.

Moreover, the Court must be guided by language in the Statement of Administrative Action to the Uruguay Round Agreements Act directing the Commission to "examine other factors to ensure that it is not attributing injury from other sources to the subject imports." Statement of Administrative Action, H.R. Doc. No. 316, 103rd Cong., 2nd Sess. (1994), reprinted in Uruguay Round Agreements Act, Legislative History, Vol. VI, at 852 ("SAA"). *See* discussion *infra* pp. 10–11.

The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements * * *." SAA at 656. "[I]t is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.* (quoted in *Delverde, SrL v. United States*, 21 CIT ___, ___, 989 F. Supp. 218, 229–30 n.18 (1997)).

[7] The Court here is not endorsing a "magic words analysis." It is a well recognized principle of administrative law that "[a] court may 'uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Ceramica Regiomontana, S.A. v. United States*, 5 Fed. Cir. (T) 77, 78, 810 F.2d 1137, 1139 (1987)(quoting *Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). Moreover, the Court notes that the antidumping statute on its face does not compel a single method for analyzing causation, so long as its requirements are met. *See Gerald Metals*, 22 CIT at ___, 27 F. Supp.2d at 1357. Rather, while the Commission does not need to articulate a causation standard, the Court must nevertheless be able to reasonably discern that the Commission applied the "by reason of" analysis mandated by the statute. *Cf. Trent Tube Div. v. United States*, 14 CIT 386, 398–99, 741 F. Supp. 921, 932 (1990), *aff'd*, 975 F.2d 807, 814 (Fed. Cir. 1992).

This new language mirrors the Antidumping Agreement as revised during the Uruguay Round of GATT negotiations.[8] The previous antidumping agreement, finalized during the Tokyo Round, stated, "There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports." Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Revised Antidumping Code)(1980) at Art 3.4. The current antidumping agreement more specifically directs that, when evaluating the volume effects, price effects, and impact of the subject imports, "[t]he authorities *shall* also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." Antidumping Agreement at Art. 3.5 (emphasis added).[9]

The Defendant makes two arguments concerning the application of this Court's opinion in *Gerald Metals* that merit attention.

In its brief, the Defendant argues that,

> This Court's statement in its *Gerald Metals* opinion that the [Commission] must examine whether other factors "dilute" the effects of [the subject] imports is consonant with the SAA insofar as the Court means that the [Commission] should examine whether other factors may "account for" the harm apparently due to [the subject] imports. The Court did not state, as Plaintiffs here urge, that other factors may render the impact of [the subject] imports insignificant simply because they may be more important. Such a rule would be directly contrary to the SAA.

Def.'s Opp'n to Pl.'s Mot. for J. Agency R. ("Def.'s Br.") at 11. In short, the Defendant argues that the "by reason of" standard does not require the Commission to weigh the effects of the subject imports against the effects of other causes of injury. The Defendant defines the weighing of causes as "determining whether the injurious effect of the subject imports is greater or lesser than the injurious effect of other factors[.]" *Id.* n.8.

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[8] The previous legislative history to the U.S. antidumping statute also acknowledged that the Commission would consider other sources of injury, but was somewhat softer in tone. *See* S. Rep. No. 96–249, 96th Cong., 1st Sess. at 75 ("Of course, in examining the overall injury to a domestic industry, the [Commission] will consider information which indicates that harm is caused by factors other than the less-than-fair-value imports."); H. Rep. No. 96–317, 96th Cong., 1st Sess. at 47 ("Of course, in examining the overall injury being experienced by a domestic industry, the [Commission] will take into account evidence presented to it which demonstrates that the harm attributed by the petitioner to the * * * dumped imports is attributable to such other factors.").

[9] The Court notes that, in this regard, "the Commission need not isolate the injury caused by other factors from injury caused by unfair imports[,]" so long as it conducts an examination sufficient "to ensure that it is not attributing injury from other sources to the subject imports." SAA at 851–52. The GATT 1947 Panel Report in the Norwegian Salmon case, which the SAA endorses as illustrative of a proper causation analysis, sheds light on what is meant by "isolat[ing] the injury caused by other factors." *See* GATT Committee on Anti-dumping Practices, Imposition of Antidumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway. Apr. 27, 1994. GATT B.I.S.D. (41st Supp.) at 421–23 (1994) ("*Norwegian Salmon*"). In *Norwegian Salmon*, the GATT panel indicated that the Commission need not identify the precise extent of injury caused by other factors (i.e., isolate the injury caused by other factors) in fulfilling the requirement not to attribute injuries caused by other factors to the subject imports. *See id.*

As support for its contention, the Defendant notes the SAA's citation to page forty-seven of the House Report to the Trade Agreements Act of 1979. *See id.* (citing SAA at 885). The report states that,

> The law does not * * * contemplate that injury from [the subject] imports be weighted against other factors * * * which may be contributing to overall injury to an industry. Any such requirement has the undesirable result of making relief more difficult to obtain for those industries facing difficulties from a variety of sources, precisely those industries that are most vulnerable to subsidized or dumped imports.

H. Rep. No. 96–317, 96th Cong., 1st Sess. at 47 (1979).

The House report's admonition against the weighing of causes also appears nearly verbatim in the Senate Report to the Trade Agreements Act of 1979. *See* S. Rep. No. 96–249, 96th Cong., 1st Sess. at 74 (1979). As this Court previously noted, the Federal Circuit declined to endorse that Senate report's instruction not to weigh causes. *See Gerald Metals*, 22 CIT at ____, 27 F. Supp.2d at 1356, n.8 (citing *Gerald Metals*, 132 F.3d at 722). The Defendant argues that, because the SAA specifically refers to the House Report to the Trade Agreements Act of 1979, the Federal Circuit's declining to adopt the 1979 Senate report's admonition against weighing causes only applies to pre-URAA cases. *See* Def.'s Br. at 11 n.8.

The Court first notes that the SAA refers to the 1979 House report in the section discussing the standard for determining the likelihood of continuation or recurrence of material injury under 19 U.S.C. § 1675a (1994), not in the section discussing the material injury determination under 19 U.S.C. § 1673d(b). *See* SAA at 885. Moreover, the SAA specifically states that "[t]he likelihood of continuation or recurrence of material injury standard is not the same as the standards for material injury and threat of material injury, although it contains some of the same elements." *See id.* at 883.

Furthermore, the "by reason of" standard is consistent with a requirement not to weigh causes contributing to overall injury. In *Gerald Metals*, the Federal Circuit did not specifically contravene the 1979 Senate report's admonition against weighing causes. Rather, the court declined to interpret the report as authorizing an affirmative injury determination supported merely "by reason of a minimal or tangential contribution to material harm caused by LTFV goods." *Gerald Metals*, 132 F.3d at 722. Subsequently, this Court clarified that the "by reason of" standard requires the Commission to determine whether the statutory factors as a whole indicate that the subject imports themselves made a material contribution to the overall injury. *See Gerald Metals*, 22 CIT at ____, 27 F. Supp.2d at 1355. That the injurious effects from other sources may be greater than the effect of the subject imports is not determinative, so long as the Commission reasonably finds that the subject imports' contribution to the overall harm is material. Therefore, the Commission need not weigh (i.e., determine which is greater or lesser) causes in complying with the "by reason of" standard.

As noted above, however, it is paramount in this regard that the Commission "examine other factors to ensure that it is not attributing injury from other sources to the subject imports." SAA at 851–52. Especially where the Commission finds one main cause of injury to the domestic industry, this analysis inherently necessitates some degree of comparison between the injurious effects of the subject imports and other unrelated factors because, in some cases, other sources of injury "may have such a predominant effect in producing the harm as to * * * prevent the [subject] imports from being a material factor." *See Gerald Metals*, 22 CIT at ____, 27 F. Supp.2d at 1356 n.8.[10]

Finally, *Gerald Metals* is not, as the Defendant contends, limited to the particular facts of that case. *See NEC*, 22 CIT at ____, 36 F. Supp.2d at 391–93; *Goss Graphics System*, 22 CIT at ____, 33 F. Supp.2d at 1089–90. *Gerald Metals* clarifies that, in any case, the Commission must determine whether the statutory factors as a whole indicate that the subject imports themselves made a material contribution to the injury to comply with the "by reason of" standard. *See Gerald Metals*, 22 CIT at ____, 27 F. Supp.2d at 1355. Where other sources of injury are known, the Commission must conduct some examination to ensure that it does not attribute the harmful effects from the other factors to the subject imports. *See* SAA at 852.

B. Volume Effects

In analyzing causation, the statute requires the Commission to determine, among other things, "whether the volume of [the subject imports], or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i). Here, the Commission found that the absolute increase in volume of SRAMs from Taiwan in the United States was "nearly threefold[,]" and therefore, significant. *See* Final Determination at 33–34. Substantial evidence supports the Commission's conclusion. *See* Staff Report at IV–7, Table IV–3.

The Court cannot, however, without more, sustain the Commission's additional conclusion that the subject imports' increase relative to U.S. consumption was significant. First, as U.S. consumption also increased during the period of investigation, the subject imports' increase relative to U.S. consumption was relatively small. *See id.* at IV–7, Table IV–3. From 1994 to 1997, the period of investigation, the subject imports' market share increased by just over 2%. *See id.* at IV–9, Table IV–4.

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[10] In this regard, the Court again notes the SAA's endorsement of *Norwegian Salmon*. *See* SAA at 851. In that case, the Commission had found that, "'[a]lthough other factors may have contributed, the decline in U.S. prices for Atlantic salmon in 1988 and 1989 was due in large part to oversupply in the U.S. market.'" *Norwegian Salmon* at 423. In reviewing the Commission's determination, the GATT panel held that,

> When the amount of the increase in absolute import volume from Norway from 1987 to 1989 was *compared* to the amount of the increase in absolute import volume from other supplying countries, it could not * * * reasonably be found that the [Commission] had attributed to the Norwegian imports effects entirely caused from other supplying countries.

Id. (emphasis added). As was necessary under the circumstances, the Commission compared the volumes of the subject imports and non-subject imports in examining whether it had attributed injury from the non-subject imports to the subject imports.

Non-subject imports of SRAMs, however, in terms of both absolute and relative increases in volume, greatly exceeded the imports of Taiwanese SRAMs.[11] *See id.* at IV–7, Table IV–3, and at IV–9, Table IV–4. Moreover, the non-subject imports were recognized as a potential source of injury to the domestic industry. *See* Final Determination at 23–24. Although the Commission did not discuss the substantial presence of the non-subject imports in its discussion of the Taiwanese imports' volume effects, it did acknowledge their "growing volume" in its analysis of the impact of the subject imports. *See id.* at 37.

The Court recognizes that the Commission has discretion to weigh the significance of each factor in light of the circumstances. *See Iwatsu*, 15 CIT at 49, 758 F. Supp. at 1510–11. Nevertheless, without an explanation of how the relatively small volume of Taiwanese imports was significant given the dominant presence of non-subject imports, the Court cannot review the Commission's implicit determination that it did not attribute injury from the non-subject imports to the subject imports. *See* SAA at 851–52; *see also Norwegian Salmon* at 408 (finding that the Commission did not commit errors of fact because it "consider[ed] all information and * * * explain[ed] why [contradictory] data * * * did not detract from a finding of a significant increase in the volume of imports"). Thus, it appears that the Commission "failed to articulate a 'rational connection between the facts found and the choice made.'" *Bando Chemical Industries, Ltd. v. United States*, 16 CIT 133, 136, 787 F. Supp. 224, 227 (1992)(quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974)), *aff'd*, 26 F.3d 139 (Fed. Cir. 1994).

Therefore, the Court cannot conclude that the Commission's determination that the increase in volume of the subject imports was significant is supported by substantial evidence absent an explanation of how they are significant in light of the dominant presence of non-subject imports.[12]

C. Price Effects

The statute provides that, in evaluating the effect of the subject imports on domestic prices,

> [T]he Commission shall consider whether—(I) there has been significant price underselling by the imported merchandise as compared with the price of like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses

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[11] The non-subject imports include both non-subject Korean imports and third-country imports.

[12] The Defendant argues that "[t]he statute does not direct the [Commission] to evaluate the significance of the volume of subject imports relative to the volume of non-subject imports." Def.'s Br. at 14. The plain language of the statute, however, instructs the Commission to consider whether the volume of the subject imports is significant either in absolute or relative terms. 19 U.S.C. § 1677(7)(C)(i). Here, the Commission considered both. In evaluating the relative significance of the subject imports, the statute instructs the Commission to consider their volume "relative to production or *consumption in the United States*[.]" 19 U.S.C. § 1677(7)(C)(i)(emphasis added). Where non-subject imports are consumed in the United States, they inherently comprise a portion of consumption in the United States. Moreover, in *Norwegian Salmon*, the panel specifically compared the volume of the subject imports relative to the volume of the non-subject imports. *See Norwegian Salmon* at 423. The need to explain the significance of the subject imports' volume in light of a substantially greater volume of non-subject imports is especially acute where, as here, the non-subject imports are a potential source of the injury. *See* Final Determination at 23–24.

> prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii).

The Commission first noted that, in the SRAM market, "price is a critical factor in purchasing decisions." Final Determination at 34. The Commission further explained that,

> In such a market, significant underselling by significant and increasing volumes of imports can have a dramatic effect on prices for the domestic like product. The record in this investigation demonstrates that the large and increasing volume of LTFV imports from Taiwan undersold the domestic like product in 161 of 213, or 76 percent of possible price comparisons, at average underselling margins of 21.5 percent. While some of the underselling turned to overselling during 1996 and 1997 for products 3 and 5,[13] Taiwanese imports consistently undersold the domestic product in products 1 and 2. These more recently developed products accounted for a significant percentage of Taiwanese shipments during the latter part of the period of investigation.

Id. at 34–35.

The record confirms that the subject imports undersold the domestic SRAMs in 161 of 213 comparisons by an average margin of 21.5%. *See* Staff Report at V–20. Therefore, substantial evidence supports the conclusion that there was significant price underselling by the Taiwanese imports.

Without more, however, the Court cannot sustain the Commission's finding of a causal nexus between the underselling by Taiwanese SRAMs and the domestic price declines. In sum, the Commission concluded that price declines in 1996 and 1997 were the main source of injury to the domestic industry, and that the subject imports contributed to the depression of domestic prices to a significant degree. *See* Final Determination at 35, 37. The price declines, however, were also attributed to other known factors, the effects of which were not adequately explained by the Commission. *See id.*

The Court first notes that the Commission found that the subject imports had significant price depressing effects despite the fact that the record indicates that during 1996 and 1997 the majority of the Taiwanese imports *oversold* the domestic product. As indicated in the above quote, the Commission emphasized the underselling during 1996–1997 by Taiwanese products 1 and 2. *See id.* at 35. Moreover, the Commission found that products 1 and 2 "accounted for a significant percentage of Taiwanese shipments during the latter part of the period of investigation." *Id.* According to the Commission, "Product 1 accounted for [less than 25] percent of Taiwanese shipments in 1996 and [about 10] percent in 1997, and product 2 accounted for [roughly 20] percent of Taiwanese shipments in 1997." *Id.* at 35 n.177 (citing Staff Report at VI–7, Table IV–3, and at V–6 to V–8, Tables V–1 and V–2).

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[13] The Commission collected price information for six SRAM products, designating them products 1 through 6.

At oral argument on May 26, 1999, the parties explained how the percentage shares of Taiwanese subject imports were calculated for each of Taiwanese products 1 through 6 from tables in the Staff Report. Tables V–1 through V–6 of the Staff Report provide the respective quantities of Taiwanese products 1 through 6 for each year of the period of investigation in terms of units.[14] Meanwhile, Table IV–3 of the Staff Report indicates the Taiwanese imports' total volume for each year of the period of investigation expressed in terms of billions of bits.[15]

As explained at oral argument, the Commission performed two steps to calculate from record evidence the respective percentages of total Taiwanese imports for each product. First, the Commission converted the respective quantities of Taiwanese products 1 through 6, provided in Tables V–1 through V–6 for each year of the period of investigation, from units to billions of bits. Next, the Commission divided the yearly amount for each product obtained above by the yearly total—in terms of billions of bits—for all Taiwanese subject imports given in Table IV–3. Therefore, the Commission calculated the respective percentages of total Taiwanese subject imports that each of products 1 through 6 constituted for each year of the period of investigation in terms of billions of bits.[16]

It is not self-evident to the Court, however, that the Commission's decision to analyze products 1 through 6 in terms of billions of bits in calculating the products' respective percentages of total Taiwanese imports is reasonable. The Commission itself defined SRAMs as follows: "SRAMs are integrated circuits containing thousands or millions of cells that allow data to be stored and retrieved at high speeds. SRAMs vary by access speed (the time required to access data, measured in nanoseconds), density (the number of storage cells), and power consumption." Final Determination at 5.

Specifically, it is not clear to the Court that the true significance of each product's relative volume can appropriately be evaluated in terms of billions of bits, which is a measure only of density (as distinguished from access speed and power consumption), instead of in terms of units of SRAMs themselves. As stated by the Commission, "significant underselling by significant and increasing volumes of imports can have a dramatic effect on prices for the domestic like product." Final Determination at 34. SRAMs are priced and sold by the unit. *See* Staff Report at V–6 through V–16, Tables V–1 through V–6, and at V–21 through V–28. By measuring each product's relative share of total subject im-

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[14] A unit refers to one SRAM, a single semiconductor chip. *See* Staff Report at I–7.

[15] SRAM size is measured in terms of density, expressed as the number of storage cells, or bits, contained in a single chip. *See* Staff Report at I–7. SRAM products 1 through 6 vary in terms of their densities. Products 1, 3, and 4 each contain 1,048,576 bits. *See id.* at I–7 n.15 and V–5. A single SRAM of product 2 contains 2,097,152 bits, and products 5 and 6 each contain 262,144 bits. *See id.*

[16] The Court notes, however, that the data from Table IV–3 and Tables V–1 through V–6 do not correspond. Specifically, the amounts for products 1 through 6 from Tables V–1 through V–6, when added together to arrive at the yearly totals and converted to billions of bits, do not equal the yearly totals given in Table IV–3. Therefore, when the Commission divided each individual product's quantity from Tables V–1 through V–6 by the total Taiwanese imports from Table IV–3, it calculated inaccurate percentages. For example, Defendant's Exhibit 2, a chart presented to the Court at the May 26, 1999, oral argument to explain the evidentiary data, indicates that product 5 constituted [[ ]] of total Taiwanese subject imports in 1994. Because this number exceeds 100%, it is impossible.

ports in terms of billions of bits, however, the Commission seemingly evaluates the comparative significance of each product's price effects, to some degree, in terms of density, rather than in terms of how the products are priced and shipped—by the unit.[17]

The Court recognizes, however, that "[i]t is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985). Thus, despite the Court's misgivings, we cannot conclude that it is clearly unreasonable to measure the Taiwanese products' respective shares of total subject imports in terms of billions of bits.

As the Final Determination stands, the Commission found that products 1 and 2 accounted for less than 25% of Taiwanese shipments in 1996 and less than 33% in 1997. *See* Final Determination at 35 n.177. Meanwhile, using the Commission's methodology, products 3 and 5 accounted for more than 50% of Taiwanese shipments in 1996 and more than 67% in 1997. *See* Staff Report at IV–7, Table IV–3, at V–9 and V–10, Table V–3, and at V–13 and V–14, Table V–5. Thus, using the Commission's calculations, Taiwanese products 3 and 5, which generally oversold domestic products 3 and 5 during 1996–1997, *see id.* at V–9 and V–10, Table V–3, and at V–13 and V–14, Table V–5, constituted the majority of Taiwanese shipments during 1996–1997.

The Court notes, however, that the Commission has the discretion to weigh the significance of each factor in light of the circumstances. *See Iwatsu*, 15 CIT at 49, 758 F. Supp. at 1510–11. It may be reasonable to conclude that the Taiwanese imports had significant price depressing

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[17] For example, in terms of SRAMs imported, Taiwanese product 5 dwarfed Taiwanese product 2 throughout the period of investigation. *See* Staff Report at V–8, Table V–2, and at V–13 to V–14, Table V–5. Product 2, however, contains eight times as many bits as product 5. Therefore, because the product's relative share of total subject imports is assessed in terms of density, Taiwanese product 2 is attributed greater significance than it would have been accorded had it been evaluated in terms of units imported. Where, as here, the Commission chooses to rely on the price effects of individual products within the category of subject merchandise, it seems their relative share of total subject imports should be evaluated in terms of how they are priced—by the unit—rather than in terms of their size.

Upon calculating each product's percent share of total Taiwanese subject imports in terms of units, the record indicates that product 1 accounted for only about 10% of Taiwanese imports in 1996 and less than half of that figure in 1997. *See* Staff Report at V–6 to V–16, Tables V–1 to V–6. Product 2 accounted for a negligible percent of Taiwanese imports in 1996 and approximately 5% in 1997. *See id.* Their combined share of total subject imports was roughly 10% in 1996 and fell from that level in 1997. *See id.*

Meanwhile, as noted above, products 3 and 5 accounted for the great majority of the subject imports in 1996 and 1997. *See* Staff Report at V–6 to V–16, Tables V–1 to V–6. Based on the Court's calculations, products 3 and 5 together accounted for over 75% of Taiwanese shipments in 1996 and that share increased further in 1997 in terms of units. *See id.* Moreover, relative to total Taiwanese imports, the combined share of products 3 and 5 increased by 5–10% from 1996 to 1997, while the combined share of products 1 and 2 *decreased* slightly. *See id.*

These findings are important because, as the Commission noted, while Taiwanese products 1 and 2 consistently undersold the equivalent domestic products during 1996 and 1997, Taiwanese products 3 and 5 predominantly oversold the equivalent U.S. products during the same period. *See* Final Determination at 35; *see also* Staff Report at V–20 (explaining that, while the average margin of underselling for Taiwanese imports over the entire period of investigation was 21.5%, "results were somewhat different for products 3 and 5, the largest volume products for both U.S. producers and Taiwan importers. For these products, the U.S.-produced product was generally priced higher in 1994 and 1995 but the Taiwan product was generally priced higher in 1996 and 1997."), and at V–6 to V–16, Tables V–1 to V–6.

The Commission noted that the domestic "prices for SRAMs increased during the first half of 1995, then generally declined during the remainder of the period of investigation." Final Determination at 35. The subject imports, however, generally followed reverse trends. During 1994 and 1995, units of Taiwanese SRAMs predominantly undersold the domestic product, yet largely oversold the domestic product during the latter part of the investigation. *See* Staff Report at V–6 to V–16, Tables V–1 to V–6. Thus, when each product's relative share of total subject imports is evaluated in terms of units, the record appears to contradict the finding of a causal connection between the prices of Taiwanese imports and the domestic product.

effects in 1996–1997, despite the fact the majority of the subject imports generally oversold the domestic product during that period.

Here, however, the Commission failed to explain how it ensured that it did not attribute the price depressing effects from other known factors to the subject imports. While acknowledging that other factors, such as global oversupply, the learning curve, and non-subject imports, played roles in the 1996–1997 price declines,[18] *see* Final Determination at 35, the Commission nevertheless concluded that "[t]he domestic industry's financial troubles [were] due in *significant* part to the price depressing effects of the subject imports from Taiwan on the domestic like product during the period of investigation." *Id.* at 37 (emphasis added).

The Commission's determination, however, was conclusory. "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). Although the Commission concluded that the subject imports themselves caused the domestic price declines to a "significant degree," it did not explain the basis for that conclusion given the extensive evidence of other known sources of injury. *Cf. Norwegian Salmon* at 408. Specifically, while the Commission acknowledged the price depressing effects of the global oversupply, the learning curve, and the non-subject imports, the Court cannot discern how it ensured that it did not attribute the harmful effects from these other factors to the subject imports.

Although the Commission is presumed to have made the requisite findings, the Court "must have a reviewable, reasoned basis." *Bando Chemical*, 16 CIT at 136, 787 F. Supp. at 227 (citing *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 1174, 1177, 704 F. Supp. 1068, 1071 (1988)("In order to ascertain whether action is arbitrary, * * * reasons for the choices made among various potentially acceptable alternatives usually need to be explained.")); *see also*

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[18] The overall record discusses three other primary potential sources of the domestic price decline: the learning curve effect, global oversupply, and the presence of non-subject SRAMs in the United States. The learning curve is the phenomenon by which a firm's manufacturing costs, and hence its prices, decrease as it becomes more efficient in production. *See* Final Determination at 22. The record indicates that "SRAM prices historically show a pattern of steep price declines as the products move along market and production life cycles." *Staff Report* at I–20 and V–1; *see also* Final Determination at 22.

The record also discusses how the global SRAM market experienced oversupply during 1996 and 1997. *See* Staff Report at II–4 and V–3; Final Determination at 23. All participating commissioners agreed that the global oversupply contributed to the domestic price declines. *See* Final Determination at 23 ("SRAM supply expanded and prices fell significantly (falling below 1994 levels in the second half of 1996 and 1997)."). The record indicates that the oversupply in SRAMs was due, in part, to an inaccurate demand forecast. *See* Staff Report at V–3. In early 1995, the industry expected demand for SRAMs to increase dramatically. Consequently, producers invested in developing more factories and built up their inventories. As the industry restricted supply, prices rose. By the middle of 1996, however, it became evident that the industry had greatly overestimated the future demand for SRAMs. Thus, as new factories came online and producers sold off inventories, oversupply resulted, causing price declines. *See id.*; Final Determination at 23.

Finally, the overall record also indicates that the presence of non-subject imports in the United States potentially contributed to the price declines. *See* Staff Report at II–13 ("Non-subject imports, most of which are from Samsung (Korea) and Japan account for a large share of the U.S. market for SRAMs."), at IV–7, Table IV–3, and at IV–9, Table IV–4. All participating commissioners agreed that the presence of non-subject imports was an important condition of competition in the United States, stating:

> The fifth condition of competition is the presence in the U.S. market of non-subject imports. The non-subject imports increased in market share during the period of investigation and were larger in volume than the subject imports. * * * Regarding the non-subject imports from Korea, which are the only non-subject imports for which pricing data are on the record, they both undersold and oversold the domestic like product, but generally were priced lower than the U.S. product.

Final Determination at 23–24.

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167–68 (1962). Without such a reasoned basis, the Court is unable to sustain the Commission's implicit finding that the other sources of price decline did not "have such a predominant effect in producing the harm as to * * * prevent the [subject] imports from being a material factor." *Gerald Metals*, 22 CIT at ____, 27 F. Supp.2d at 1356 n.8.

CONCLUSION

The Commission found that "[t]he domestic industry's financial troubles [were] due in significant part to the price depressing effects of the subject imports from Taiwan on the domestic like product[.]" Final Determination at 37. The Commission, however, must not attribute the harmful effects from other sources of injury to the subject imports and must adequately explain how it ensured not doing so. Therefore, the Commission's affirmative determination is remanded for reconsideration consistent with this Court's opinion.

The Commission shall complete its remand determination by **Monday, August 30, 1999**; any comments or responses are due by **Wednesday, September 29, 1999**; and any rebuttal comments are due by **Thursday, October 14, 1999**.

(Slip Op. 99–70)

SHAKEPROOF ASSEMBLY COMPONENTS DIVISION OF ILLINOIS TOOL WORKS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97–12–02066

[Plaintiff's Motion for Judgment Upon an Agency Record granted in part, denied in part.]

(Decided July 29, 1999)

Creskoff & Doram, L.L.P. (Stephen M. Creskoff, Robert T. Hume, Lisa E. Smilan) for Plaintiff.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau), Robert E. Nielsen*, Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

OPINION

BARZILAY, *Judge:* This case is before the Court on Plaintiff's USCIT R. 56.2 Motion for Judgment Upon an Agency Record. Plaintiff challenges certain aspects of the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final determination in *Certain Helical Spring Lock Washers from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg.

61794–801 (Nov. 19, 1997) ("Final Determination"). Defendant partially opposes Plaintiff's motion, but agrees that a remand is required to enable Commerce to recalculate the value for steel scrap by eliminating duplicate total quantity and value figures for the period April 1995—August 1995. For the reasons that follow the Court remands the case to the agency to explain how the use of import price data for steel wire rod to value all steel wire rod, including domestically sourced rod, promotes accuracy in this case, to recalculate the steel scrap factor by eliminating duplicative data and certain import data which were aberrational and to explain why good cause did not exist to verify the steel wire rod import price information submitted by the respondent. The Court has jurisdiction under 28 U.S.C. § 1581(c) (1994) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (1994).

I. Introduction

The present controversy arises out of the third administrative review conducted by Commerce stemming from an October, 19, 1993, antidumping duty order[1] respecting helical spring lock washers ("washers") from the People's Republic of China. Commerce assigned Hangzhou Spring Washer Plant, subsequently known as Zhejian Wanxin Group, Co. ("ZWG"), a respondent in the original investigation, an individual dumping margin. On November 15, 1996, Commerce initiated the third annual review covering the period October 1, 1995—September 30, 1996. *See* 61 Fed. Reg. 58513. Commerce published its preliminary determination on July 11, 1997[2] and its Final Determination on November 19, 1997.[3]

No one challenged Commerce's designation of China as a nonmarket economy and so Commerce used a factors of production analysis, pursuant to 19 U.S.C. § 1677b(c) (1994) to determine the normal value for the washers produced by ZWG.[4] Commerce, without objection, chose India as the appropriate surrogate country pursuant to 19 U.S.C. § 1677b(c)(4). Plaintiff challenges Commerce's use of the price paid for steel wire rod imported from the United Kingdom by ZWG, accounting for 34.7 percent of ZWG's total purchases of steel wire rod during the period of review ("POR"), to value all steel wire rod. Additionally, Plaintiff argues that Commerce failed to verify the price information ZWG submitted and miscalculated the final dumping margin by using duplicative and aberrational data.

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[1] 58 Fed. Reg. 53914.

[2] 62 Fed. Reg. 37192.

[3] 62 Fed. Reg. 61794–801.

[4] Normal value in market economy cases is generally the price at which the foreign product is first sold in the exporting country. *See* 19 U.S.C. § 1677b(a)(1)(B)(i) (1994). However, in nonmarket economies the statute directs Commerce to value the merchandise on the basis of the factors of production. *See* 19 U.S.C. § 1677b(c) (1994). The export price (or constructed export price) is generally the price of the merchandise at importation after certain statutory adjustments are made. *See* 19 U.S.C. §§ 1677a(a)–(b) (1994). The amount by which the normal value exceeds the export price or constructed export price is the dumping margin. *See* 19 U.S.C. § 1677(35)(A) (1994).

II. Standard of Review

In reviewing a challenge to Commerce's determination in an antidumping administrative review, the Court is to hold unlawful a determination, finding or conclusion by Commerce that is unsupported by substantial evidence or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept to support a conclusion." *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938); *accord Matsushita Elec. Indus. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

To determine whether Commerce has acted in accordance with law the court must undertake the two step analysis prescribed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). First the court must determine whether the statute speaks to the precise question at issue. *See id.* at 842. If the statute is clear or the legislative history unambiguously expresses Congress' intent then the matter is at an end, for the agency cannot contravene the will of Congress. *See id.* at 842–843. Second, if the court determines the statute is silent or ambiguous, the question to be asked is whether the agency's construction of the statute is permissible. *See id.* at 843. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Provided Commerce has acted reasonably, the court may not substitute its judgment for the agency's. *See IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992). Substantial deference is accorded to Commerce's statutory interpretations since the ITA is the "'master' of the antidumping laws." *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995).

III. Discussion

A. *The Statute Does not Speak to Whether Commerce May Use Import Prices to Value Domestically Purchased Materials.*

Plaintiff argues that the use of import prices to value non-imported material is contrary to law because Congress has addressed the issue in 19 U.S.C. § 1677b(c) by providing for surrogate country values to be used to the extent possible and thus falls under the first step in the *Chevron* analysis. *Chevron*, 467 U.S. at 842. Plaintiff claims that the statute requires Commerce to determine normal value "on the basis of the value of the factors of production * * * [and] the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the [Department]." 19 U.S.C. § 1677b(c)(1). Furthermore, the statute provides that Commerce "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries * * *." 19 U.S.C. § 1677b(c)(4).

Nowhere does the statute speak directly to any methodology Commerce must employ to value the factors of production, indeed the very structure of the statute suggests Congress intended to vest discretion in Commerce by providing only a framework within which to work. The

statute requires Commerce to use the best available information, but does not define that term.[5] *See e.g., Olympia Indus. v. United States*, 7 F. Supp.2d 997, 1000 (1998) ("The relevant statute does not clearly delineate how Commerce should determine what constitutes the [best available information]." (citation omitted)). If Congress had desired to restrict the material on which Commerce could rely, it would have defined best available information.

Another signal that Congress did not speak and therefore left Commerce discretion in developing the details of its methodology is the phrase "to the extent possible" in defining how Commerce is to value the prices or costs of factors of production. *See* 19 U.S.C. § 1677b(c)(4). Having decided that the statute grants discretion to Commerce to decide what qualifies as the best available information, the Court proceeds to examine whether Commerce acted reasonably pursuant to the second step in the *Chevron* analysis. *Chevron*, 467 U.S. at 843.

B. *Since the Purpose of the Antidumping Law Is Accurate Calculations of Dumping Margins, Commerce's Use of Import Prices to Value Domestically Purchased Material Must Promote Accuracy to Be Reasonable.*

In the Final Determination, Commerce used the import price paid for steel wire rod, which accounted for 34.7% of all steel wire rod used during the POR, to value the remaining 65.3% of the rod purchased domestically. Commerce defended its decision on three grounds. First, Commerce stated that it acted in accordance with an established administrative practice and judicial precedent. *See* 62 Fed. Reg. 61794, 61796. Second, Commerce found the amount of the imported steel wire rod to be significant. *Id.* Third, Commerce found the imported steel to be physically identical to the domestically purchased steel. *Id.*

Despite Commerce's representations, its actions with regard to import price data in this case do not follow clearly established administrative practice nor do they enjoy affirming judicial precedent. At the hearing held on this matter, Defendant's counsel conceded that this was an issue of first impression.[6] *See* Transcript, at 46. Additionally, the judicial decision cited by Commerce in the Final Determination was limited to a situation where Commerce used the cost that manufacturers paid on the international market for the supplies they used. *See Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1445 (Fed. Cir. 1994). Thus, the issue presented is one of first impression and although the standard of review does not change, the reasonableness of Commerce's new practice lacks judicial support.

Although Commerce claims that the amount of imported steel wire rod used in this case is significant, the Court cannot agree as there is no

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[5] The terms best available information and best information available have, on occasion caused some confusion. *See e.g., Coalition for the Preservation of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States*, 44 F. Supp.2d 229, 255 n.46 (CIT 1999).

[6] Commerce's position in the Final Determination and in its brief was that its use of imported purchases to value domestically purchased material was a consistent administrative practice. However, Commerce has never used the import prices of approximately one-third of the input to value the entire input, as it did in this review.

basis on which to evaluate what Commerce means when it uses the term. In the Final Determination, the only justification of Commerce's finding that the amount of imported steel wire rod was significant was that the imported steel accounted for approximately one-third of all steel wire rod used during the POR. *See* 62 Fed. Reg. 61795, 61796. The Court finds Commerce's explanation of the significance of the import volume to be deficient in several respects. As Commerce itself noted, "the purpose of the antidumping statute is to 'determine margins as accurately as possible.'" *Id.* (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *see also Lasko Metal Prods. Inc. v. United States*, 43 F.3d 1142, 1446 (Fed. Cir. 1994); *Union Camp Corp. v. United States*, CIT Slip Op. No. 99–40 (1999); *Olympia Indus. v. United States*, 7 F.Supp.2d 997, 1000–1001 (1998); *Nation Ford Chem. Co. v. United* States, 985 F. Supp. 133, 135 (CIT 1997); *Writing Instrument Mfr. Ass'n v. United States*, 984 F. Supp. 629, 637 (CIT 1997). While Congress has left it within Commerce's discretion to develop methodologies to enforce the antidumping statute, any given methodology must always seek to effectuate the statutory purpose—calculating accurate dumping margins. Whether Commerce's use of imported prices to value an entire factor of production is reasonable is inextricably linked to whether the methodology promotes accuracy. *See e.g., Lasko Metal Prods., Inc. v. United States*, 810 F.Supp 314, 317, 16 CIT 1079, 1081, *aff'd*, 43 F.3d 1442, 1445 (Fed. Cir. 1994) (noting that Commerce's combination of surrogate values and market-based values would be unreasonable if the results were less accurate). Accuracy may result if a significant amount of the input is imported and if, in that case, Commerce chooses to use the import price to value all of the input. But contrary to Commerce's claim, here, the use of import prices to value domestically purchased material will not promote accuracy, fairness or predictability unless Commerce explains its finding of significance. As the matter stands, Commerce defines "significant" as "a meaningful amount, *i.e.*, not insignificant. * * *" 62 Fed. Reg. 61795, 61796. The Court finds this to be no definition at all.

Whether the use of import prices to value domestically purchased material promotes accuracy, and thus is reasonable under the statute, may indeed vary from case to case. Of course, as the amount of imported material actually used in the production of the article approaches 100%, the reasonableness and accuracy of Commerce's determination are enhanced. However, even in those instances, Commerce must not ignore the possibility that use of import prices to value domestically purchased material is somehow distorting, and thus inaccurate. As Plaintiff argues, there was publicly available information indicating that the value or cost of steel obtained from domestic mills in China during the POR was substantially higher than import prices. On remand, Commerce must demonstrate that the use of import prices to value domestically pur-

chased materials promotes accuracy.[7] Therefore, the Court reserves judgment on the reasonableness of Commerce's action until it has the opportunity to explain, with reference to the record, how its use of import prices in this case has led to the calculation of a more accurate dumping margin than any of the alternatives available to it.

In addition to its claim that Commerce's methodology promoted accuracy, fairness and predictability, Commerce argues that it would have been illogical to use different prices for physically identical material. Commerce responded to the Plaintiff's objection to the use of prices paid for imported material to value domestically purchased material, in part, by stating that "[t]here is no evidence that the imported steel * * * should be considered a different factor of production from the domestically-sourced steel." *See* 62 Fed. Reg. 61794, 61796. Yet Commerce has used import prices and surrogate data in the past to value the same factor of production and that practice has been upheld. *See Lasko Metal Prods. United States*, 43 F.3d 1442 (Fed. Cir. 1994); *see also Melamine Institutional Dinnerware Products from the People's Republic of China*, 62 Fed. Reg. 1708, 1711 (Jan. 13, 1997). Thus, the Court finds Commerce's argument on this point wholly without merit.

C. *Commerce Failed to Examine Whether Good Cause Existed to Verify the Prices Submitted By ZWG.*

Plaintiff argues that in addition to the error committed by Commerce in using the import prices to value all of the steel wire rod used in the production of the washers, Commerce had good cause to verify the validity of the price information submitted by ZWG. Defendant's initial response was that Plaintiff did not request verification, but at oral argument it became clear that since a verification had been conducted in a prior review, the applicable regulation, 19 C.F.R. § 353. 36(a)(v)(B) (1996), did not provide Plaintiff the right to request verification.[8] *See* Transcript, at 39–40. Implicit in Commerce's position, particularly evident from oral argument, is that Plaintiff failed to exhaust its administrative remedies because it never requested verification of the import prices ZWG submitted.

It is a cardinal principle of administrative law that a court may not consider arguments that were not made before the agency. *See United States v. L.A. Tucker Truck Line*, 344 U.S. 33, 36–37 (1952) ("We have recognized * * * that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts."). However, the equally well recognized exception to the exhaustion of administrative remedies rule is that

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[7] The Court also notes that Commerce's definition of significant does not promote predictability. The rationale to use prices paid on the open market to value an entire factor of production will vary from case to case. Accordingly, it is impossible under Commerce's present approach to significance determinations to foster predictability. The absence of predictability is not fatal to Commerce's methodology, but it enhances the need for Commerce to explain fully, on the record, its grounds for decision.

[8] As a result, the only way verification can occur is if the Secretary acts on his own initiative. *Compare* 19 C.F.R. § 353.36 (v) *with* 19 C.F.R. § 353.36(iv).

exhaustion is not required where the efforts of the individual would be futile. *See Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *see also United Black Fund, Inc. v. Hampton*, 352 F. Supp. 898, 902 (D.D.C.1972) ("[I]t is well settled that an action should not be dismissed for failure to exhaust administrative remedies when an attempt to gain the desired relief from the agency in question would obviously be a futile act ."); *accord Rhone Poulenc, Inc. v. United States*, 7 CIT 133, 583 F. Supp. 607 (1984). Moreover, 28 U.S.C. § 2637(d) grants the court discretion in deciding when requiring exhaustion is appropriate. *See United States v. Priority Prods., Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986).

Here, it is clear that even if Plaintiff had requested verification, the regulation gives an interested party the right to request it only if "[t]he Secretary conducted no verification * * * during either of the two immediately preceding administrative reviews." 19 C.F.R. § 353.36(a)(v)(B). Since a verification occurred during the first administrative review, Plaintiff did not have the right to request verification under the ITA's regulations. Therefore, on remand, Commerce should reconsider its use of unverified import price information and explain why good cause does not exist to verify the prices ZWG submitted, especially since Commerce seeks to use the information to value all of the steel wire rod used in the production of the washers.

D. *Commerce's Decision to Use the March 1996 Indian Import Statistics to Value Steel Scrap Is not Supported By Substantial Evidence.*

Plaintiff submits that Commerce's use of certain March, 1996, Indian import data for steel scrap was aberrational and should have been excluded because Indian imports from Germany, Korea and the United Kingdom distorted the March unit value for steel scrap. Indeed, Plaintiff points to a subsequent determination by Commerce in an unrelated investigation where the identical data was found to be aberrational. While the Defendant is correct that the subsequent review is beyond the record of this case, its importance is in Commerce's acknowledgment that its administrative practice with respect to aberrational data is "to disregard small-quantity import data when the per-unit value is substantially different from the per-unit values of the larger quantity imports of that product from other countries." *See* 63 Fed. Reg. 16758, 16761 (citing *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China, Final Results of Administrative Reviews*, 62 Fed. Reg. 11813 (March 13, 1997); *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Romania, Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 37194 (July 11, 1997). Thus, the practice referred to by Commerce existed prior to the effective date of the Final Determination. Commerce failed to follow its administrative practice because the record demonstrates that the import prices for steel scrap derived for India were compared to prices in other countries. *See* A.R. 50. It was through this comparison that Commerce found the Indian import prices for steel scrap not to be aberrational, although the record discloses the Indian

price to be the highest of all the countries examined, except for Indonesia, which appears to be clearly aberrational. *See* A.R. 50, at 8. Here, Commerce failed to follow its administrative practice of excluding "small-quantity import data when the per-unit value is substantially different from the per-unit values of the larger quantity imports of that product from other countries." The Court finds Commerce's decision to retain the March 1996 import data is not based on substantial evidence. On remand, Commerce must recalculate the Indian steel scrap figure by making the appropriate adjustments in accordance with its administrative practice to discard any aberrational figures.

E. *Plaintiff Has not Met Its Burden On Its Claim that Commerce Failed to Disregard Data Regarding Paper Cartons.*

In a footnote on the final page of its moving brief, Plaintiff raises an argument that Commerce failed to disregard aberrational data regarding paper cartons imported into India. As the Defendant correctly noted in its response, the burden of proving Commerce's determination incorrect lies with the party challenging the determination. *See* 28 U.S.C. § 2639(a)(1). The Plaintiff did not address the Indian paper carton issue at all in its reply. The Court finds the Plaintiff has failed to meet its burden on this issue and upholds the decision of Commerce to use certain Indian data regarding paper cartons.

F. *Commerce Must Delete the Duplicate Data for April 1995—August 1995 When Recalculating the Steel Scrap Value Factor.*

It is uncontested that Commerce erred in its calculation of the surrogate value for steel scrap by using the incorrect total quantity and value figures for April 1995—August 1995. Commerce has agreed to delete the duplicate figures and recalculate the steel scrap factor along with the additional recalculation discussed above.

IV. Conclusion

For the foregoing reasons, the Court grants Plaintiff's Motion in part, denies it in part and remands. An order so stating will be entered accordingly.

(Slip Op. 99–71)

NTN BEARING CORP. OF AMERICA, NTN CORP., AMERICAN NTN BEARING MFG. CORP., NTN DRIVESHAFT, INC., AND NTN-BOWER CORP., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS, AND TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 97–01–00092

Plaintiffs, The Torrington Company ("Torrington") and NTN Bearing Corp. of America, NTN Corporation, American NTN Bearing Mfg. Corp., NTN Driveshaft, Inc. and NTN-Bower Corporation (collectively "NTN") have filed separate motions for judgment on the agency record pursuant to Rule 56.2 of the rules of this Court contesting various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final results of the fifth administrative review, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 Fed. Reg. 66,472 (Dec. 17, 1996).

Torrington challenges (1) Commerce's acceptance of a foreign importer's deduction of imputed interest expenses on antidumping duty cash deposits from total indirect selling expenses; and (2) Commerce's determination to grant certain allocated discounts and post-sale price adjustments to importers' home market price calculations.

NTN challenges the following actions by Commerce: the inclusion of (1) home market sales of sample merchandise and (2) sales allegedly not in the ordinary course of trade in its foreign market value ("FMV") calculation; (3) the determination not to make a circumstance of sale adjustment based on the difference in prices at different levels of trade; (4) the determination to allocate selling expenses over total sales without regard to level of trade in calculating both United States and home market price; (5) the determination to exclude related party sales in calculating FMV; and (6) the reallocation of U.S. selling expenses based upon the sale price to the first unrelated purchaser.

Held: Torrington's motion is denied. NTN's motion is granted in part and denied in part. Case is remanded for Commerce to: (1) review the record to determine whether it is possible to isolate and remove the portions of Koyo's warranty expenses which relate to non-scope merchandise from the adjustments to FMV or, in the alternative, to deny the adjustment if such an apportionment cannot be made; and (2) exclude any sample transactions unsupported by consideration. Commerce is affirmed in all other respects.

[Torrington's motion is denied. NTN's motion is granted in part and denied in part. Case remanded.]

(Dated July 29, 1999)

Barnes, Richardson & Colburn (Donald J. Unger, Kazumune V. Kano and *Christine H.T. Yang)* for NTN Bearing Corp. of America, NTN Corporation, American NTN Bearing Mfg. Corp., NTN Driveshaft, Inc, and NTN-Bower Corporation.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis*, Assistant Director); Of counsel: *Mark A. Barnett, Myles S. Getlan* and *Sanjay J. Mullick*, Attorney-Advisors, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy LLP, (Peter O. Suchman, Neil R. Ellis and *Elizabeth C. Hafner)* for Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Lipstein, Jaffe & Lawson, LLP (Robert A. Lipstein, Matthew P. Jaffe and *Grace W. Lawson)* for NSK Ltd. and NSK Corporation.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Geert De Prest and *Lane S. Hurewitz)* for The Torrington Company.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs, The Torrington Company ("Torrington"), NTN Bearing Corp. of America, NTN Corporation, American NTN Bearing Mfg. Corp., NTN Driveshaft, Inc. and NTN-Bower Corporation (collectively "NTN"), have filed separate motions for judgment on the agency record pursuant to Rule 56.2 of the rules of this Court contesting various aspects of the final results of the fifth administrative review (from May 1, 1993, through April 30, 1994).

BACKGROUND

This case concerns antifriction bearings ("AFBs") and parts thereof from Japan. Commerce published the antidumping duty order covering AFBs from Japan on May 15, 1989. *See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, 54 Fed. Reg. 20,904. On December 7, 1995, Commerce published the preliminary results of the fifth review under the Order entitled, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Japan, Singapore, Sweden, Thailand, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Notice of Intent to Revoke Order*, 60 Fed. Reg. 62,817. On December 17, 1996, Commerce published its final results of the subject review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews ("Final Results")*, 61 Fed. Reg. 66,472, as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 62 Fed. Reg. 149 (Jan. 2, 1997), *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Germany, Italy, Japan, and the United Kingdom: Amended Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 3,003 (Jan. 21, 1997).[1]

DISCUSSION

The Court has jurisdiction in this case pursuant to 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

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[1] Because the reviews in this case were initiated prior to January 1, 1995, the applicable law is the antidumping statute as it existed prior to the amendments made by the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

A. TORRINGTON'S ISSUES

1. *Abandoned Claims*

As a preliminary matter, the Court notes that in addition to the claims raised below, Torrington also challenged (1) Commerce's failure to apply the reimbursement regulation in instances where transfer prices were less than cost plus profit and actual dumping margins were found, and (2) Commerce's inclusion of below-cost sales in calculating constructed value. *See* Torrington's Mem. Supp. J. Agency R. at 42–56. However, Torrington has abandoned these two claims in light of *Torrington Co. v. United States*, 127 F.3d 1077 (Fed. Cir. 1997). *See* Letter from Torrington (Stewart & Stewart) to the Clerk of the Court (Nov. 6, 1997).

As a consequence of Torrington's abandonment of these counts, and pursuant to the Court of Appeals decision in *Torrington*, 127 F.3d 1077, the Court affirms Commerce's calculation of profit for constructed value and its determination to refrain from applying the reimbursement regulation in this case.

2. *Deduction of Imputed Interest Expenses on Antidumping Duty Cash Deposits From Indirect Selling Expenses*

In the *Final Results*, Commerce permitted Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo") to deduct imputed interest expenses on antidumping duty deposits from Koyo's United States indirect selling expenses. *Final Results*, 61 Fed. Reg. at 66,488–89.

Torrington argues that Commerce's deduction encourages companies to dump by providing a larger offset as the antidumping duty deposit becomes greater. Further, Torrington claims that Commerce's determination contradicts its most recent practice in the seventh review. Torrington requests that the Court remand this issue to Commerce with instructions to deny such claims or, in the alternative, to explain its departure from its prior practice. Torrington's Mem. Supp. J. Agency R. at 15–22.

Commerce maintains that neither the statute nor the legislative history prohibits this adjustment to indirect selling expenses. Commerce further asserts that by deducting imputed interest on antidumping duty deposits, it followed its practice of the third and fourth reviews, which were sustained by this Court in *NSK Ltd. v. United States*, 21 CIT ___, 969 F. Supp. 34 (1997), and *Federal-Mogul Corp. v. United States*, 20 CIT 234, 918 F. Supp. 386 (1996). Although Commerce acknowledges a re-

cent change in its position regarding imputed interest in the seventh review, it argues that the new position has no retroactive application. Commerce's Partial Opp'n to Mots. J. Agency R. at 40–45.

Koyo argues that *Federal-Mogul Corp. v. United States*, 20 CIT 1438, 1440–41, 950 F. Supp. 1179, 1182–83 (1996), supports Commerce's treatment of its imputed interest expenses. Koyo Opp'n to Torrington's Mot. J. Agency R. at 6. Koyo further asserts that Commerce's subsequent practices do not affect the results of the subject review. *Id.* at 8.

This Court has consistently upheld the adjustment to indirect selling expenses when Commerce has granted it, and has remanded to Commerce to allow the adjustment when Commerce denied it in the final results. *See Timken Co. v. United States*, 21 CIT ____, ____, 989 F. Supp. 234, 250 (1997) (remanding for Commerce to grant adjustment); *NSK*, 21 CIT at ____, 969 F. Supp. at 55 (same); *Federal-Mogul*, 20 CIT at 1440–41, 950 F. Supp. at 1182–83 (upholding Commerce's decision to grant adjustment).

In accordance with this Court's well-established position, *see Timken Co. v. United States*, 22 CIT ____, ____, 16 F. Supp. 2d 1102, 1104 (1998), the Court holds that Commerce's determination to grant an adjustment to indirect selling expenses for imputed interest payments incurred in financing antidumping duty cash deposits is supported by substantial evidence and is in accordance with law.

3. *Allocated Discounts, Post-Sale Price Adjustments and Billing Adjustments in FMV Calculations*

In the fifth review, Commerce generally made direct adjustments to foreign market value ("FMV") for discounts, rebates and price adjustments if they were either reported on a transaction specific basis or were granted as a fixed percentage of sales price on each transaction (such as a fixed percentage rebate program or an early-payment discount granted on the total price of a pool of sales). *Final Results*, 61 Fed. Reg. 66,498.

a. NTN's Billing Adjustments

As one of the adjustments, Commerce granted NTN's reported billing adjustments to home market sales prices. Commerce found that the great majority of NTN's adjustments were transaction specific and determined that the instances of non-transaction specific reporting were so few as to not render the billing adjustments distortive. Commerce therefore treated all of NTN's reported home market billing adjustments as direct adjustments to FMV in the *Final Results*. 61 Fed. Reg. 66,501.

Torrington argues that Commerce erred by treating NTN's home market billing adjustments as direct expenses with which to adjust FMV. Torrington asserts that home market billing adjustments can be used as a direct adjustment only if reported on a transaction specific basis, not on groups of sales (i.e., in a non-transaction specific manner) as NTN reported its billing adjustments. Torrington's Reply Supp. J. Agency R. at 7–9. According to Torrington, Commerce's decision to accept dis-

counts as direct deductions to FMV conflicts with *Torrington Co. v. United States*, 82 F.3d 1039 (Fed. Cir. 1996). Torrington asks for a remand so that Commerce may adjust FMV only for billing adjustments reported on a transaction specific basis and deny the adjustment where reported otherwise. *Id.* at 10.

NTN asserts that Torrington's arguments regarding NTN's non-transaction specific home market billing adjustments are meritless because the majority of its adjustments were transaction specific. NTN asserts that the instances of non-transaction specific reporting did not have any impact on the calculation of FMV and consequently, did not affect NTN's dumping margin. NTN's Mem. Opp'n Torrington's Mot. J. Agency R. at 5–8.

Sections 1677a and 1677b require Commerce to determine the price actually charged to a customer both in the home market (FMV) and in the United States (USP) for the merchandise at issue. *See* 19 U.S.C. §§ 1677a, 1677b (1988). The actual price charged to a customer necessarily includes adjustments for discounts or rebates paid by the company to the customer. The issue here is whether Commerce may accept NTN's billing adjustments as direct adjustments to FMV where most, but not all, of the adjustments were granted on a transaction specific basis.

For Commerce to allow an adjustment to FMV for discounts and price adjustments under sections 1677a and 1677b, Commerce must first determine what type of adjustment is being sought (direct or indirect) and then determine whether the adjustment sought is calculated and recorded in the manner required for its type. A direct expense applied as an adjustment to FMV is inherently an expense which either varies with the quantity sold, *Zenith Elecs. Corp. v. United States*, 77 F.3d 426, 431 (Fed. Cir. 1996), or is "related to a particular sale." *Torrington*, 68 F.3d at 1353. The billing adjustment NTN seeks is an expense, which by its nature, is direct. The direct adjustment sought by NTN must, therefore, be reported in a manner appropriate for direct adjustments before Commerce may grant the adjustment to FMV.

To ensure that the exporter's claimed adjustments reflect actual discounts and rebates paid only on the subject merchandise, Commerce generally requires that these adjustments be reported on a transaction specific basis or be based on a fixed and constant percentage of sales price on all transactions reported. *Final Results*, 61 Fed. Reg. at 66,498. However, this Court has held that "[t]he relevant issue regarding direct adjustments is ultimately not whether they were reported on a transaction specific basis, but whether a respondent can demonstrate that its adjustments were not made over non-subject merchandise." *NSK*, 21 CIT at ____, 969 F. Supp. at 47 (citing *Federal-Mogul*, 20 CIT at 1443, 950 F. Supp. at 1184–85).

The crux of the issue, therefore, is whether Commerce's determination that NTN's billing adjustments reported on a non-transaction specific basis were made solely over in-scope merchandise was reasonable.

If Commerce reasonably determined that the adjustment pertained only to subject merchandise, then the Court must uphold Commerce's determination.

Although NTN bases its argument that the adjustment should be upheld because there were only a few instances of non-transaction specific reporting, the record reveals that the Court should uphold the adjustment on other grounds. After careful review of the confidential record, the Court concludes that for the few instances of non-transaction specific reporting, NTN was able to tie the adjustment directly to in-scope merchandise, specifically, to product code and model number. Commerce's granting of the adjustment was therefore reasonable and in accordance with law.

b. *NSK's Home Market Early Payment Discounts*

NSK grants rebates, in the form of early payment discounts, to its distributors if the distributors resell the bearings to certain customers approved in advance by NSK. Commerce allowed the early payment discounts as a direct adjustment to FMV because the discounts were granted as a fixed percentage of all purchases by a given customer. *Final Results*, 61 Fed. Reg. at 66,500–01.

Torrington claims that NSK's reporting method of dividing early payment discounts granted to a customer by the customer's total payments to obtain a customer-specific early payment discount factor for the period of review is distortive. Torrington argues that actual early payment discounts are granted on a month-by-month basis, not as NSK reported them. Finally, Torrington asserts that under *Torrington*, 82 F.3d at 1050–51, Commerce cannot treat expenses directly related to particular sales as indirect selling expenses to be deducted from FMV as part of an exporter's sales price offset. Torrington's Reply Supp. Mot. J. Agency R. at 14–15.

NSK argues that its early payment discounts are a fixed percentage of total discounts and, therefore, they qualify as a direct adjustment to price. NSK acknowledges that Commerce prefers that discounts be reported on an invoice-specific basis, but asserts that such reporting was not possible in this case, because NSK does not issue invoices for each shipment in the home market. However, NSK argues that there is ample evidence on the record revealing how the early payment discount is earned, recorded and reported which conclusively demonstrates that the early payment discount applied equally to scope and non-scope merchandise and is a fixed percentage across all sales. NSK's Opp'n to Torrington's Mot. J. Agency R. at 4–8.

The Court agrees with Commerce and NSK. Torrington erroneously emphasizes form over substance. By arguing that Commerce should solely consider the method of recording and allocation of the expenses instead of the calculation of expenses, Torrington ignores well-established law. Although Commerce generally requires transaction specific reporting before granting adjustments to FMV for early payment discounts, Commerce will also allow an adjustment if the adjustment is

based on a fixed and constant percentage of sales price on all transactions reported. As discussed above, these two methods, approved by Commerce and the Courts, ensure that the adjustment is granted for in-scope merchandise only. Commerce's decision to allow the adjustment where NSK demonstrated that the early payment discount was granted across all sales is in conformity with Commerce's approved practice. Accordingly, because Commerce's method accurately determined that the adjustment was attributable to early payment discounts on the subject merchandise, Commerce is affirmed.

c. *Koyo's Home Market Warranty Expenses*

In the *Final Results*, Commerce accepted Koyo's home market warranty expenses as direct expenses. 61 Fed. Reg at 66,485.

Commerce asserts that, upon review of the record, it cannot determine the extent to which Koyo granted its reported warranty expenses on subject merchandise. Commerce, therefore, asks for a remand with respect to Koyo's warranty expenses. Commerce's Partial Opp'n Mots. J. Agency R. at 56–57.

Torrington contends that in accepting Koyo's home market warranty expenses as direct selling expenses, Commerce improperly allowed Koyo to allocate expenses which should have been reported on a transaction specific basis. Torrington's Mem. Supp. J. Agency R. at 40–47.

Although Koyo recognizes that this Court has already decided this issue against Koyo in *NSK*, 21 CIT ____, 969 F. Supp. 34, Koyo asks that the Court reconsider its decision in *NSK* and affirm Commerce's acceptance of Koyo's warranty expenses in the *Final Results*. Koyo's Opp'n to Torrington's Mot. J. Agency R. at 5–6. Koyo also argues that even though its warranty expenses were allocated over a pool of products that may not all have been within the scope of the AFB antidumping order, virtually all products were within the scope of one of the three outstanding orders against Koyo's products. *Id.* at 6 (incorporating by reference Koyo's Response to Torrington's Mot. J. Agency R. at 15–16, filed in *NSK*, 21 CIT ____, 969 F. Supp. 34 (dated Apr. 19, 1996)).

The Court declines to revisit its opinion in *NSK*, 21 CIT ____, 969 F. Supp. 34. Pursuant to that decision, the Court grants Commerce's request for a remand so that Commerce may review the record to determine whether it is possible to isolate and remove the portions of Koyo's warranty expenses which relate to non-scope merchandise from the adjustments to FMV or to deny the adjustment if such a distinction and apportionment cannot be made.

B. NTN'S ISSUES

1. *Inclusion of NTN's Home Market Sales of Sample Merchandise in Calculating FMV*

In the *Final Results*, Commerce determined that certain NTN sample sales in the home market were not outside the ordinary course of trade. Commerce, therefore, included these sales in the calculation of FMV. 61 Fed. Reg. at 66,513–14.

a. *Inclusion of Low-volume Sales in Calculating FMV*

In the *Final Results*, Commerce determined that:

> NTN's standard of "low volume of sales" is inadequate as a definition of sales not in the ordinary course of trade. NTN has presented no other supporting information that identifies a low-volume sale as outside the ordinary course of trade. [Commerce] has determined that "infrequent sales of small quantities of certain models is insufficient evidence to establish that sales were made outside the ordinary course of trade."

Final Results, 61 Fed. Reg. at 66,514. Commerce asserts that its inclusion of certain transactions labeled by NTN as "samples" should be sustained.

NTN argues that *all* its sales labeled as "sample sales" should have been excluded from the FMV calculation. NTN asserts that samples sales were designated as such for valid business reasons and that, inherently, these reasons remove the sample sales from the ordinary course of trade. NTN's Mem. Supp. Mot. J. Agency R. at 8–12. Specifically, NTN argues that Commerce should have excluded sales with an "extremely sporadic sales history" from its FMV calculations because such sales are outside the ordinary course of trade.

Commerce responds that NTN's argument is based on a confusion of certain trade law realities. Commerce argues that NTN is using the phrase "usual commercial quantities" and "ordinary course of trade" interchangeably, even though they are distinct concepts, separately defined under different statutes. For example, Commerce explains, although both concepts pertain to the calculation of FMV, a company may be denied a claim to exclude sales outside the ordinary course of trade, but still receive an adjustment for sales that are not in the usual commercial quantities. In addition, Commerce argues that NTN never claimed during the administrative proceedings, as required, that its sales were not in the "usual commercial quantities." Further, Commerce points out that NTN does not claim that any correlation exists between the price and quantity of the sales at issue, which Commerce requires before determining a specific price with which to calculate FMV. Commerce's Partial Opp'n Mots. J. Agency R. at 18–19.

Torrington agrees with Commerce and asserts that a low volume of sales, by itself, does not establish that the sale is outside the ordinary course of trade. Further, Torrington argues that NTN did not meet its burden of proving that its sample sales are outside the ordinary course of trade, and that, therefore, Commerce properly included NTN sample sales in calculating FMV. Torrington's Opp'n to Mot. J. Agency R. at 11–15. In addition, Torrington argues that the Court has already rejected NTN's argument. Torrington's Opp'n to Mot. J. Agency R. at 16–17.

The Court agrees with Commerce and Torrington. The statute defines FMV as the price "at which such or similar merchandise is sold * * * in the usual commercial quantities and in the ordinary course of

trade for home consumption." 19 U.S.C. § 1677b(a)(1)(A). "The term 'ordinary course of trade' means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise which is the subject of an investigation, have been normal in the trade under consideration with respect to merchandise of the same class or kind." 19 U.S.C. § 1677(15). In determining whether a sale is outside the ordinary course of trade, Commerce must consider "all the circumstances particular to the sales in question." *Cemex, S.A. v. United States*, 133 F.3d 897, 900 (1988) (quoting *Murata Mfg. Co. v. United States*, 17 CIT 259, 264, 820 F. Supp. 603, 607 (1993)); *see also Thai Pineapple Public Co. v. United States*, 20 CIT 1312, 1314, 946 F. Supp. 11, 15 (1996). "An analysis of these factors should be guided by the purpose of the ordinary course of trade provision which is to prevent dumping margins from being based on sales which are not representative of the home market." *Cemex*, 133 F.3d at 900 (internal quotations omitted). The factors Commerce may consider in its analysis include: home market demand, volume of home market sales, sales quantity, sales price, profitability, customers, terms of sale and frequency of sales. *See, e.g., Thai Pineapple*, 20 CIT at 1315, 946 F. Supp. at 16; *see also Cemex, S.A. v. United States*, 19 CIT 587, 589–593 (1995). "In sum, ordinary course of trade is determined on a case-by-case basis by examining all of the relevant facts and circumstances." *Cemex*, 19 CIT at 593.

Plaintiff has the burden of proving whether the sales used in Commerce's calculations are outside the ordinary course of trade. *See, e.g., Nacho-Fujikoshi Corp. v. United States*, 16 CIT 606, 608, 798 F. Supp. 716, 718 (1992) (citing *Koyo Seiko Co. v. United States*, 16 CIT 539, 543, 796 F. Supp. 1526, 1530 (1992)).

NTN argues that because it designated certain sales under the variable "sample" in its accounting that those transactions were outside the ordinary course of trade and, therefore, should be excluded from NTN's home market database prior to calculating weighted average prices for FMV. NTN's Mot. J. Agency R. at 9. However, a party's mere designation of certain transactions as "sample sales" is not sufficient to meet plaintiff's burden of proof.

In *NTN Bearing Corp. v. United States*, 19 CIT 1221, 1227–29, 905 F. Supp. 1083, 1089–91 (1995), the Court held that sales that are infrequent are not necessarily outside the "ordinary course of trade." The Court found that "[w]ithout a complete explanation of the facts which establish the extraordinary circumstances rendering particular sales outside the ordinary course of trade, Commerce cannot exclude those sales from FMV." *NTN*, 19 CIT at 1229, 905 F. Supp. at 1091.

In this case, Commerce requested from NTN detailed information regarding sales that NTN claimed were outside the ordinary course of trade. In response, NTN merely described the methodology it used to identify low-volume sales. As discussed in *NTN*, 19 CIT at 1227–29, 905 F. Supp. at 1089–91, this alone is not sufficient to support the exclusion of these low-volume sales from NTN's FMV calculations. In its final de-

termination, Commerce reasonably determined that NTN failed to meet its burden of proving that the sales used in Commerce's calculations are outside the ordinary course of trade. The Court therefore upholds Commerce's determination to include non-zero priced low-volume sample sales in NTN's home market database when calculating the FMV of NTN's AFBs.

b. Zero-Priced Transactions

The transactions which NTN identified during the review as sample sales included some transactions which occurred for a price of zero. A zero-priced transaction does not qualify as a "sale" and, therefore, by definition cannot be included in Commerce's FMV calculation. *See NSK Ltd. v. United States*, 115 F.3d 965, 975 (1997) (holding that the term "sold" requires both a transfer of ownership to an unrelated party and consideration).

Consequently, in light of *NSK*, the Court remands to Commerce to exclude any sample transactions unsupported by consideration from NTN's FMV calculations.

2. *Circumstance of Sales Adjustment Based on Differences in Prices at Different Trade Levels*

NTN reported sales at different levels of trade in the home market. *Final Results*, 61 Fed. Reg. at 66,508. During the review, NTN requested that Commerce make a price-based level of trade ("LOT") adjustment when U.S. sales were matched to home market sales across different levels of trade. Commerce denied a LOT adjustment based upon differences in prices, stating the following:

> [R]espondents must quantify any price differentials that are directly attributable to differences in levels of trade. During the course of this administrative review, NTN made no attempt to quantify the degree to which differences in prices were attributable wholly or partly to differences in levels of trade.

Final Results, 61 Fed. Reg. at 66,508 (internal quotations omitted).

NTN argues that it provided evidence which supported a LOT adjustment and asks that the Court remand so that Commerce could state its reasons for its refusal to make an adjustment and specify what proof Commerce needs to quantify a LOT adjustment for NTN. NTN's Mem. Supp. Mot. J. Agency R. at 13–16. NTN acknowledges that this Court has rejected its argument regarding a LOT adjustment in previous cases but asks the Court to reconsider the issue. *Id.* at 16. Torrington agrees with Commerce's determination that NTN did not submit information sufficient to support a LOT adjustment.

A careful review of the record indicates that NTN submitted some evidence of varying costs and expenses across different LOTs. Nonetheless, the Court upholds Commerce's determination to deny an LOT adjustment, because NTN failed to show how LOTs account for the differences in price which NTN reported. Although NTN argues that "these distinctions in cost readily relate to the differences in price," *see* NTN's Mem.

Supp. J. Agency R. at 14, NTN did not demonstrate how the differences in cost and in price were attributed to LOT. A mere declaration that the differences exist is insufficient to grant a LOT adjustment.

"This Court has consistently upheld a denial of a level of trade adjustment where a respondent has failed to demonstrate that differences in price were directly attributable to differences in level of trade." *Timken Co. v. United States*, 21 CIT ____, Slip Op. 97–87 at 10 (July 3, 1997) (citing *Koyo Seiko Co. v. United States*, 20 CIT 772, 777, 932 F. Supp. 1488, 1493 (1996), *NTN Bearing Corp.*, 19 CIT at 1232–33, 905 F. Supp. at 1094–95, *NTN Bearing Corp. of Am. v. United States*, 17 CIT 1149, 1154, 835 F. Supp. 646, 650 (1993)). In addition, the Court has upheld the denial of price-based LOT adjustments where the party "merely indicated variances in prices and selling expenses at the different levels of trade, without illustrating the factors to which they were attributable." *NSK*, 21 CIT at ____, 969 F. Supp. at 53. Therefore, the Court finds that Commerce's denial of a price-based LOT adjustment in this case is supported by substantial evidence and is in accordance with law.

3. *Reallocation of NTN's Selling Expenses Without Level of Trade Adjustment Based on Indirect Selling Expenses*

In the *Final Results* Commerce determined that the methods NTN used for allocating its indirect selling expenses did not bear any relationship to the manner in which NTN incurred the expenses, leading to distorted allocations. Commerce further determined that NTN's allocations according to LOT were misplaced and that NTN could not conclusively demonstrate that its indirect selling expenses vary across LOTs. Because Commerce found that NTN did not provide sufficient evidence demonstrating that selling expenses are attributable to trade levels, Commerce recalculated NTN's expenses to represent selling expenses for all home market sales in the *Final Results*. 61 Fed. Reg. at 66,489. Torrington supports Commerce and argues that NTN has not distinguished the current review from previous reviews in which the Court affirmed Commerce's reallocation method.

NTN argues that it submitted evidence that unequivocally established that NTN incurred different selling expenses at different trade levels. NTN's Mem. Supp. J. Agency R. at 17. Accordingly, NTN argues that Commerce should have accepted its allocation of U.S. and home market indirect selling expenses. Although NTN recognizes that the Court decided against it when considering a similar issue concerning the level of trade adjustment, NTN argues that the facts of this case are materially different from those of the previous review. *Id.* at 18.

A careful review of the record[2] indicates that NTN's method of allocating U.S. indirect expenses did not substantiate its claim that its selling expenses are attributable to different LOTs. In fact, in some instances, NTN even failed to demonstrate that its indirect selling ex-

[2] This includes the confidential record describing in depth NTN's method for allocating expenses.

penses varied at all across LOTs. The Court therefore affirms Commerce in this respect.

4. *Exclusion of NTN's Home Market Sales to Related Parties in Calculating FMV*

Commerce excluded NTN's home market sales to related parties in calculating FMV. *Final Results*, 61 Fed. Reg. at 66,511. Commerce asserts that it properly exercised its discretion and excluded NTN's related party sales in calculating FMV when Commerce's test disclosed that, on average, NTN's prices to related parties were lower that its prices to unrelated parties. Commerce's Partial Opp'n Mots. J. Agency R. at 30–37.

NTN argues that Commerce's method of determining whether NTN's related party sales were at arm's length was improper. According to NTN, Commerce should not have discarded NTN's related party sales without first examining other factors in addition to price, such as, the terms and the quantities of each related party sale, because those factors influence price. NTN believes that the consideration of additional factors is necessary to determine whether related party sales are "comparable" to sales to unrelated party's under Commerce's regulation 19 C.F.R. § 353.45. NTN's Mem. Supp. J. Agency R. at 18–19. NTN further objects to Commerce's use of a weighted average approach to determine whether related party prices are comparable to unrelated party prices. According to NTN, Commerce's weighted average methodology is unreasonable because it does not accurately reflect the price levels to unrelated and related parties for part number in the same class or kind. Although NTN recognizes that this Court has affirmed Commerce's decision to exclude related party sales in *NSK*, 21 CIT ____, 969 F. Supp. 34, and *NTN*, 19 CIT 1221, 905 F. Supp. 1083, NTN asks that the Court remand for Commerce to revise its test for determining whether related party sales were made at prices comparable to unrelated party sales. NTN's Mem. Supp. J. Agency R. at 18–21.

Torrington supports Commerce exclusion of NTN's related party sales from the calculation of FMV. In addition, Torrington asserts that Commerce has the authority to exclude related party sales, unless Commerce is satisfied with the price. Torrington also asserts that NTN has not demonstrated that Commerce's determination was unreasonable.

According to 19 U.S.C. § 1677b(3):

> If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller * * *, the prices at which such or similar merchandise is sold * * * may be used in determining the foreign market value.

Because the statute is silent as to when Commerce should use related-party sales in calculating FMV, Commerce has broad discretion to make that determination. *See*, *Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837, 842–43 (1984).

Commerce's relevant regulation, 19 C.F.R. § 353.45, provides that:

> If a producer or reseller sold such or similar merchandise to a person related as described in [19 U.S.C. § 1677(13)], [Commerce] ordinarily will calculate foreign market value based on that sale only if satisfied that the price is comparable to the price at which the producer or reseller sold such or similar merchandise to a person not related to the seller.

Accordingly, there is a strong presumption that Commerce will not use a related-party price in the calculation of FMV "unless the manufacturer demonstrates to Commerce's satisfaction that the prices are at arm's length." *SSAB Svenskt Stal AB v. United States*, 21 CIT ____, ____, 976 F. Supp. 1027, 1030 (1997).

NTN concedes that, in general, prices to related parties were lower than prices to unrelated parties. Further, NTN failed to show why Commerce's reliance on price is unreasonable. *See NTN*, 19 CIT at 1242, 905 F. Supp. at 1100 (rejecting the assertion that Commerce should consider factors other than price in determining whether to disregard related-party sales). The Court, therefore, affirms Commerce's determination to disregard related party sales.

5. *Reallocation of United States Selling Expenses Based on Resale Price to the First Unrelated Party*

NTN reported to Commerce the selling expenses it incurred in the United States, which were allocated on the basis of transfer prices from the manufacturer to its related U.S. subsidiary. Commerce reallocated the expenses based on the resale prices to the first unrelated purchasers because it determined that the resale prices provided a more reliable measure of value. *Final Results*, 61 Fed. Reg. at 66,515.

NTN argues that Commerce does not provide any explanation for its decision to reallocate NTN's U.S. selling expenses. According to NTN, Commerce's conclusion that prices to unrelated parties are more accurate than the transfer price is incorrect. NTN acknowledges that this Court sustained Commerce's methodology in *NSK*, 21 CIT ____, 969 F. Supp. 34, but requests that the Court remand so that Commerce could recalculate NTN's margin based on NTN's data as reported. NTN's Mem. Supp. J. Agency R. at 21–22. Torrington agrees with Commerce and asserts that this Court has already rejected NTN's argument.

The Court declines to revisit its rationale articulated in *NSK*, which held that Commerce's reallocation of selling expenses based on the sales price to the first unrelated purchaser is reasonable. Accordingly, the Court affirms Commerce's method of calculating NTN's margin using resale prices and not transfer prices.

CONCLUSION

The case is remanded for Commerce to: (1) review the record to determine whether it is possible to isolate and remove the portions of Koyo's warranty expenses which relate to non-scope merchandise from the adjustments to FMV or, in the alternative, to deny the adjustment if such

an apportionment cannot be made; and (2) exclude any sample transactions unsupported by consideration from the calculation for NTN's FMV. Commerce is affirmed in all other respects.

(Slip Op. 99–72)

CHEVRON CHEMICAL CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–09–01141

[Plaintiff's motion for summary judgment denied. Defendant's motion for summary judgment granted.]

(Decided July 29, 1999)

Phelan & Mitri (Michael F. Mitri) for Plaintiff.

David W. Ogden, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, *Bruce N. Stratvert*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Chi S. Choy*, Of Counsel, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for Defendant.

OPINION AND ORDER

I. INTRODUCTION

POGUE, *Judge:* Plaintiff, Chevron Chemical Co., challenges a decision of the U.S. Customs Service ("Customs") denying Plaintiff's protest filed in accordance with section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514 (1994). The action involves the proper classification for customs duty purposes of Plaintiff's petroleum derivative, AL–304, under the Harmonized Tariff Schedule of the United States ("HTSUS").[1] Jurisdiction is predicated on 28 U.S.C. § 1581(a)(1994), and, therefore, Customs' classification is subject to *de novo* review pursuant to 28 U.S.C. § 2640 (1994). This action is before the Court on the

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[1] The provisions under consideration are as follows:

Chapter 38, Section VI:

Heading/Subheading	*Article Description*
3817	Mixed alkylbenzenes and mixed alkylnaphthalenes, other than those of heading 2707 or 2902:
3817.10	Mixed alkylbenzenes:
3817.10.10	Mixed linear alkylbenzenes
3817.10.50	Other
* * * * * * *	
3823	Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included:
3823.90	Other:
	Other:
* * * * * * *	
3823.90.45	Other:
	Mixtures that are in whole or in part of hydrocarbons derived in whole or in part from petroleum, shale oil or natural gas

Continued

summary judgment motions made by Plaintiff and Defendant pursuant to USCIT Rule 56.

Upon liquidation Customs classified the subject AL–304 as a "mixed linear alkylbenzene" under subheading 3817.10.10, HTSUS (1993), and assessed a 17.3% *ad valorem* duty. Plaintiff claims that the merchandise is properly classifiable under the residual provision, subheading 3823.90.45, HTSUS, which describes a broad category of chemical products not specified or included elsewhere, and is assessed a 7% *ad valorem* duty. Alternatively, Plaintiff maintains that the merchandise is classifiable as articles returned to the United States, after being exported for alterations, and thus classifiable under subheading 9802.00.50, HTSUS. Under this proposed classification, the merchandise is dutiable at the rate otherwise applicable to the article, assessed only on the cost or value of the foreign alterations.

II. UNDISPUTED FACTS

Even though there are differences in the factual positions advanced by each party, summary judgment is appropriate in this action because there is no genuine issues of material fact in dispute.

Plaintiff's imported AL–304, is a mixed linear alkylbenzene. *See* Defendant's Statement of Additional Material Facts As to Which There is No Genuine Issue to Be Tried ("Def.'s Additional Facts") ¶ 1; Plaintiff's Response to Defendant's Statement of Additional Material Facts ("Pl.'s Response") ¶ 1. Specifically, AL–304 is a mixture of long carbon side-chain mono-linear alkylbenzenes and di-linear alkylbenzenes. *See* Plaintiff's Complaint ("Pl.'s Complaint") ¶ 9; Defendant's Answer ("Def.'s Answer") ¶ 9.

The term "alkylbenzene" describes a compound with two major structural components: the "alkyl" component and the "benzene" component. *See* Def.'s Additional Facts ¶ 4; Pl.'s Response ¶ 4. The "alkyl" component of the AL–304 is a saturated acyclic hydrocarbon[2] group that has between 20 and 24 carbon atoms.[3] *See* Def.'s Additional Facts ¶ 7; Pl.'s Response ¶ 7. The "benzene" component consists of six carbon atoms and six hydrogen atoms forming a benzene ring.[4] *See* Def.'s Additional Facts ¶ 5; Pl.'s Response ¶ 5.

Chapter 98, Section XXII

U.S. Notes

1. The provisions of this chapter are not subject to the rule of relative specificity in general rule of interpretation 3(a). Any article which is described in any provision in this chapter is classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met.

Heading/Subheading	*Article Description*
	Articles returned to the United States after having been exported to be advanced in value or improved in condition by any process of manufacture or other means:
	Articles exported for repairs or alterations:
9802.00.40	Repairs or alterations made pursuant to a warranty
9802.00.50	Other

[2] A hydrocarbon is a chemical compound composed only of carbon and hydrogen; the largest source of hydrocarbons is from petroleum crude oil. *See* MCGRAW-HILL DICTIONARY OF CHEMISTRY 304 (1984).

[3] Plaintiff avers "that the alkyl component of substantially all (95% or more) of the linear alkylbenzene molecules contained in AL–304 is a saturated acyclic hydrocarbon that contains between 20 and 24 carbon atoms, and the alkyl component of a relatively small portion (5% or less) of the linear alkylbenzene molecules contained in AL–304 is a saturated acyclic hydrocarbon that contains approximately 18 or 26 carbon atoms." Pl.'s Response ¶ 7.

[4] Plaintiff alleges "that this statement describes linear (acyclic) alkylbenzene molecules, as opposed to cyclic alkylbenzene molecules." Pl.'s Response ¶ 5.

The AL–304 is manufactured for Plaintiff in France from an alpha olefin[5] fraction that Plaintiff produces in the United States. *See* Def.'s Additional Facts ¶ 9; Pl.'s Response ¶ 9. The production process undertaken in France involves the reaction of benzene with the alpha olefin with the aid of a catalyst (hydrofluoric acid).[6] *See id.* There is a chemical reaction that joins a carbon atom of the olefin to a carbon atom of benzene. *See id.* The result is the subject AL–304.

The AL–304 is used to produce alkylbenzene sulfonic acids that, in turn, are used to produce alkylbenzene sulfonates, i.e., detergent additives in lubricating oils for gasolines and other fuels. *See* Pl.'s Statement Of Material Facts As To Which There Is No Genuine Issue To Be Tried ¶ 24; Def.'s Additional Facts ¶¶ 18, 19; Pl.'s Response ¶¶ 18, 19; Def.'s Response to Questions Posed by the Court at 1.

III. Standard and Scope of Review

Pursuant to USCIT Rule 56, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(d); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

As noted above, there is no dispute concerning the basic characteristics of the subject AL–304. Both parties agree that the AL–304 (1) is a mixed linear alkylbenzene (2) consisting of carbon side-chain mono-linear alkylbenzenes and di-linear alkylbenzenes (3) with the "alkyl" component containing a carbon group of approximately between 20–24 carbon atoms and (4) the "benzene" component consisting of six carbon atoms and six hydrogen atoms forming a benzene ring and (5) used to produce alkylbenzene sulfonic acids that, in turn, are used to produce alkylbenzene sulfonates. Accordingly, summary judgment is appropriate here because the material facts as to what constitutes the merchandise are not at issue. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998). The Court is then left with the purely legal question involving the meaning and scope of the relevant tariff provisions.[7] *See Baxter Healthcare Corp.*, No. 98–1343, at 5 (citing *Totes, Inc. v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995)); *see also*

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[5] Alpha olefins are open chain hydrocarbons consisting of carbon and hydrogen atoms containing at least one double bond in the alpha position. *See* Def.'s Additional Facts ¶ 8; Pl.'s Response ¶ 8.

[6] Plaintiff claims that "the statements set forth in this paragraph constitute an oversimplification of the AL–304 production process and omit certain elements and variables of that process." Pl.'s Response ¶ 9.

[7] In *United States v. Haggar Apparel Co.*, 119 S. Ct. 1392 (1999), the Supreme Court held that Customs' interpretation of the HTSUS, as manifested in issued regulations, is entitled to deference under the framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "Although this case is distinct from *Haggar* in that no Customs regulations are at issue, we recognize that the Supreme Court's pronouncement may nonetheless raise questions regarding the proper standard of review of Customs' interpretation of the HTSUS." *Avenues In Leather, Inc. v. United States*, No. 98–1511, at 2 (Fed. Cir. May 20, 1999); *see also Baxter Healthcare Corp. of Puerto Rico v. United States*, No. 98–1343, at 6 (Fed. Cir. July 2, 1999)(finding when structure of import not in dispute and Customs had not promulgated any interpretive regulations concerning the particular headings and subheadings, proper classification "only requires a determination of the proper meaning and scope of the relevant provisions and a determination of the ultimate classification"). Because we reject Plaintiff's interpretive position with respect to heading 3817, HTSUS, *see* discussion *infra* pp. 8–13, and uphold Customs' classification, based on a review of the proper meaning and scope of the relevant provisions, the Court does not further address the standard of review issue here.

Sports Graphics, Inc. v. United States, 24 F.3d 1390, 1391 (Fed. Cir. 1994)(resolving the question of law as to whether particular imported merchandise has been classified under an appropriate tariff provision entails a two step process: (1) ascertaining the proper meaning of the specific terms in the tariff provision; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed).

IV. DISCUSSION

General Rule of Interpretation ("GRI") 1 for the HTSUS provides that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." Gen. R. Interp. 1, HTSUS; *see Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998); Gen. R. Interp. 6 (providing that the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading, section, and chapter notes); Explanatory Notes for the GRI at 1 ("the terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification").

A. The Subject Merchandise Is Properly Classifiable Under Heading 3817, HTSUS

Heading 3817, HTSUS, covers "[m]ixed alkylbenzenes and mixed alkylnaphthalenes, other than those of heading 2707 or 2902." Additional U.S. Note 2(c) states that "[f]or purposes of headings 2902, 2907 and 3817, the term 'alkyl' describes any saturated acyclic hydrocarbon group having six or more carbon atoms or, subject to note 1 to Chapter 29, any mixtures of such groups averaging six or more carbon atoms."[8] As noted, the subject AL–304 is a mixed linear alkylbenzene with a saturated acyclic hydrocarbon "alkyl" component that has between 20 and 24 carbon atoms. It is undisputed that the AL–304 is not a mixture of alkylnaphthalenes, or a mixture of alkylbenzenes described under HTSUS heading 2707 (weight of aromatic constituents must exceed weight of nonaromatic constituents) or heading 2902 (cyclic hydrocarbons, allowing mixtures of isomers of same organic compound only). *See* Mem. Supp. Pl.'s Mot. Summary J. ("Pl.'s Mem.") at 21–22, 30; Def.'s Additional Facts ¶ 16. Accordingly, the Court finds that the subject AL–304 is expressly provided for under the plain language of subheading 3817.10.10.

Even when merchandise falls within the literal language of the statute, however, such literal interpretation should be rejected if it produces a result contrary to the apparent legislative intent. *See Procter & Gamble Mfg. Co. v. United States*, 19 CCPA 415, 419 T.D. 45578 (1932), *cert denied*, 287 U.S. 629 (1932); *see also EM Indus., Inc. v. United*

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[8] "The section or chapter Notes form an integral part of the Harmonized Tariff System and have the same legal force as the text of the headings." *Trans-Border Customs Services, Inc. v. United States*, 18 CIT 22, 25, 843 F. Supp. 1482, 1486 (1994), *aff'd*, 76 F.3d 354 (Fed. Cir. 1996). "The function of the Notes is to define the precise scope of each heading, subheading, chapter, subchapter, and section." *Id.* at 26, 843 F. Supp. at 1486.

States, 22 CIT ___, ___, 999 F. Supp. 1473, 1478–79 (1998)("While construing a statute so as to carry out the legislative intent requires that the court first look to the statutory language itself, that does not mean, however, the court is foreclosed from also considering readily available guidance from the Explanatory Notes as to the intended scope of subheadings.")(citation omitted).[9]

The Explanatory Notes to heading 3817, provide, as follows,

> This heading covers **mixed alkylbenzenes** and **mixed alkylnaphthalenes** obtained by alkylation of benzene and naphthalene. They have fairly long side-chains and are not of the kind mentioned in the second part of the text of heading 27.07. Mixed alkylbenzenes are used, *inter alia*, as solvents, and in the manufacture of surface-active agents, lubricants and insulating oils. Mixed alkylnaphthalenes are mainly used for the manufacture of alkylnaphthalene sulphonic acids and their salts.

Harmonized Commodity Description and Coding System, Explanatory Notes (1st ed. 1986)("Explanatory Notes") at 538.

Plaintiff challenges Customs' classification, arguing that the language of heading 3817, when read together with its Explanatory Notes mandates that the subject AL–304 be classified elsewhere. *See* Pl.'s Mem. at 20. Thus, Plaintiff maintains, "heading 3817 was not intended to cover mixtures of the type comprising the subject merchandise * * *." *Id.* Specifically, Plaintiff contends that the chemical industry separates alkylbenzenes into short chain, medium chain, long chain and very long chain alkylbenzenes.[10] *Id.* at 11–14. Plaintiff further maintains that the subject AL–304, a mixture of linear alkylbenzenes in the C20 to C24 carbon side-chain range, falls under the "long chain" side-chain category. *Id.* at 25. Therefore, Plaintiff argues that the subject AL–304 is not a mixture of "fairly long" linear alkylbenzenes as described in the Explanatory Notes for heading 3817. *Id.* at 27.

When a tariff term is not defined in either the HTSUS or its legislative history, the term's correct meaning is the common and commercial meaning, *Mita Copystar America v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994), which is presumed to be the same. *See Nippon Kogaku (USA), Inc. v. United States*, 69 CCPA 89, 92, 673 F.2d 380, 382 (1982);

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[9] The Explanatory Notes constitute the Customs Co-operation Council's official interpretation of the Harmonized Tariff System. The Council was established in 1952 by convention in Brussels. The Customs Co-operation Council is now known as the World Customs Organization which publishes the Harmonized Commodity Description and Coding System. It has long been settled that "[w]hile the Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting HTS[US] subheadings." *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995).

[10] Plaintiff asserts that "[i]n the chemical family of commercial alkylbenzenes the entire range of carbon side-chain lengths runs from C1 to approximately C30 * * * there are established industrial uses for three main categories of alkylbenzenes, depending primarily upon the lengths of their side-chains. There are 'short chain' compounds, with carbon side-chains in the C1 to C3 range, 'medium chain' compounds, with side-chains in the C11 to C13 range, and 'long chain' compounds, with side-chains in the C16 to C24 range. The side-chains can be linear or branched, and, for the 'medium chain' and 'long-chain' compounds, there can be one side-chain ('mono-alkyl') or two ('di-alkyl'). There is no significant commercial production of, and there are no established industrial uses for, alkylbenzenes with carbon side-chains in the ranges of C4 to C10 and C14 to C15. There is limited production of certain 'very long chain' compounds, in the side-chain range of C25–C30 and above, and these compounds typically are used industrially as alternatives to paraffin waxes." Pl.'s Mem. at 10–11.

see also Permagrain Products, Inc. v. United States, 9 CIT 426, 429, 623 F. Supp. 1246, 1248 (1985), *aff'd*, 791 F.2d 914 (Fed. Cir. 1986).

Here, however, Plaintiff has provided no evidence or authority for its assertion that the chemical industry distinguishes "fairly long" side-chains from long side-chains. Rather, Plaintiff directs the Court's attention to the use of the modifier "fairly" in the Explanatory Notes. From the mere presence of the term "fairly long," and with no other support, Plaintiff contends that "the tariff recognizes the existence of 'longer' chain compounds that are not properly classified under HTSUS heading 3817." Pl.'s Mem. at 26. Essentially, Plaintiff apparently attempts to rely on the Explanatory Notes as evidentiary support for its asserted industry practice and attempts to invoke such industry practice to support its interpretation of the Explanatory Notes. This circular reasoning, on its own and absent some grounding in fact or authority, does not provide factual support for Plaintiff's position.

Plaintiff also argues that the AL–304 cannot be classified under HTSUS subheading 3817.10.10 because it has properties and characteristics different from other alkylbenzenes covered by heading 3817. *See* Pl.'s Mem. at 28. Specifically, Plaintiff maintains that the AL–304 possesses only one of the four exemplar uses enumerated under the Explanatory Notes for alkylbenzene mixtures that are classified under heading 3817. *Id.* Plaintiff reads the accompanying Explanatory Notes too narrowly.

First, it is irrelevant whether or not AL–304 has side-chain characteristics different from other alkylbenzenes because heading 3817 and subheading 3817.10.10, HTSUS, are *eo nomine* provisions in that they describe goods by "specific names" and ones "known to commerce." *See United States v. Bruckmann*, 65 CCPA 90, 94 n.8, C.A.D. 1211, 582 F.2d 622, 625 (1978). An *eo nomine* provision that names an article without terms of limitation, absent evidence of a contrary legislative intent, is deemed to include all forms of the article. *See Nootka Packing Co. v. United States*, 22 CCPA 464, 469–70, T.D. 47,464 (1935). Although the Explanatory Notes relied on by Plaintiff describe the alkylbenzenes falling under heading 3817, HTSUS, as having "fairly-long" side chains, there is no evidence of Plaintiff's asserted industry nomenclature differentiating the categories of "short, medium, long and very long" chain alkylbenzenes.[11] Moreover, there is nothing in the language of the Explanatory Notes itself to support a distinction between long and "fairly long" side-chain alkylbenzenes. Nor is it otherwise apparent that Congress intended to limit the heading as Plaintiff argues. The Court will not read restrictive language into heading 3817, HTSUS, or accept Plaintiff's interpretation where it is not supported by the evidentiary record or the statutory language, and it does not appear that such limitation was intended. *See, e.g., American Bayridge Corp. v. United States*,

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[11] As noted, the only restriction as to the application of heading 3817 is found in Additional U.S. Note 2(c) to Section VI, which defines the term "alkyl" to include hydrocarbon groups that have six or more carbon atoms. *See* discussion *supra* pp. 8–9.

22 CIT ____, ____, 35 F. Supp. 2d 922, 930 (1998)("Had Congress intended to limit 44.07, Congress would have chosen 'more forceful words to express that intent'."), *judgment*, 22 CIT ____, 35 F. Supp. 2d 942 (1999), *appeal docketed*, No. 99–1228 (Fed. Cir. Jan. 28, 1999).

Second, AL–304 is used exclusively in the manufacture of surface-active agents,[12] one of the uses explicitly enumerated under the Explanatory Notes for heading 3817. Moreover, the list of uses is prefaced with the term "inter alia," which means "among other things." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 635 (1984). By itself, the term "inter alia" demonstrates that the exemplars of the Explanatory Notes were not intended to be exhaustive. The Explanatory Notes simply list examples of the possible applications of mixed alkylbenzenes. Plaintiff's interpretation of the accompanying Explanatory Notes ignores the term "inter alia."

In conclusion, the Court finds that the plain language of subheading 3817.10.10, HTSUS expressly covers the subject AL–304.

B. The Subject Merchandise Is Not More Specifically Provided For In Heading 3823, HTSUS

Plaintiff also argues that the subject AL–304 is covered by heading 3823, HTSUS, which describes a broad category of chemical products not specified or included elsewhere. *See* Pl.'s Mem. at 29. Specifically, Plaintiff claims that its merchandise is properly classifiable under subheading 3823.90.45, HTSUS, as a mixture made up "in whole or in part of hydrocarbons derived in whole or in part from petroleum, shale oil or natural gas." Plaintiff directs the Court's attention to the accompanying Explanatory Notes, which provide for the classification of chemical products "whose composition is not chemically defined, whether they are obtained as by-products of the manufacture of other substances * * * or prepared directly." *Id.* at 29 (quoting Explanatory Notes at 541). Plaintiff maintains the AL–304 is an "incomplete or unfinished" sulfonate having the "essential character" of a "complete or finished" sulfonate, which is classifiable under HTSUS subheading 3823.90.45.[13] *Id.* at 31.

Heading 3823 is a residual basket provision that describes a broad category of chemical products not included elsewhere in the HTSUS. Classification of imported merchandise in a basket provision, however, is appropriate only when there is no tariff category that covers the merchandise more specifically. *See, e.g.*, *EM Indus.*, 22 CIT at ____, 999 F. Supp. at 1480 ("'Basket' or residual provisions of HTSUS Headings, such as subheading 3206.49.50, are intended as a broad catch-all to encompass the classification of articles for which there is no more specifi-

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[12] *See* Def.'s Additional Facts ¶ 18; Pl.'s Response ¶; Pl.'s Mem. at 28; Def.'s Mem. at 10.

[13] The Explanatory Notes direct the classification of petroleum sulfonates under heading 3823, HTSUS, as follows:

[T]he preparations and chemical products falling here include:

(8) Petroleum sulphonates, not water-soluble, obtained from petroleum or petroleum fractions by sulphonation, for example, with sulphuric acid, oleum or sulphur trioxide dissolved in liquid sulphur dioxide, this process usually being followed by neutralisation.

Explanatory Notes at 542.

cally applicable subheading."); *E.M. Chemicals v. United States*, 20 CIT ____, ____, 923 F. Supp. 202, 206 (1996)(finding that subheading 3823.90.29 is a "basket provision" that cannot be applied until other provisions of the HTSUS are examined to determine if the subject merchandise is more appropriately classified elsewhere). As discussed above, AL–304 literally satisfies subheading 3817.10.10, HTSUS. Thus, by the express terms of heading 3823, AL–304 is not described by the heading.

C. The Subject Merchandise Is Not Covered Under Heading 9802, HTSUS

The HTSUS allows a duty benefit for imported articles that were previously exported from the United States to be advanced in value or improved in condition while abroad. Specifically, subheading 9802.00.50, HTSUS, describes "[a]rticles returned to the United States after having been exported to be advanced in value or improved in condition by any process of manufacture or other means: Articles exported for repairs or alterations made: Repairs or alterations made pursuant to a warranty: Other * * *."[14] The duty rate applicable to imported articles qualifying under subheading 9802.00.50, HTSUS, is calculated according to the rate that would apply to the articles if imported outside this provision. The assessment, however, is based only upon the value of the foreign repairs or alterations.[15] Plaintiff argues that its merchandise is classifiable pursuant to subheading 9802.00.50, HTSUS, as alpha olefins returned to the United States after having been exported to be advanced in value or improved in condition by a process of alteration.[16] *See* Pl.'s Mem. at 44–47. Plaintiff maintains the AL–304 starting material alpha olefins would be classifiable under subheading 3823.90.45, HTSUS. *Id.* at 45.

Defendant does not dispute the fact that the subject alpha olefins are both "advanced in value" and "improved in condition" by the foreign processes undertaken in France. Mem. Supp. Def.'s Mot. Summary J. ("Def.'s Mem.") at 13. Rather, Defendant argues that there was no alteration here. *See id.* at 14.

Changes and additions to an article constitute alterations so long as the article has not lost its identity or has not been converted into something else. *See, e.g., LeGran Mfg. Co. v. United States*, 59 Cust. Ct. 58, 62,

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[14] Chapter 98 also requires that "any applicable regulations" be met in order to be covered by it. Defendant argued in its memorandum in support of its motion for summary judgment that, "there is no evidence that Chevron ever filed a Certificate of Registration, Customs Form 4455, for the alpha olefins alleged to have undergone merely an alteration abroad." Def.'s Mem. at 15. Defendant added, "[t]his requirement set forth in Customs Regulations, 19 C.F.R. § 10.8, is mandatory." *Id.* (citing *Export Packers Co., Ltd. v. United States*, 16 CIT 394 (1992)). Plaintiff responded that the 1993 regulatory requirement of filing a Certificate of Registration at the time of export and subsequent entry, set forth at 19 C.F.R. § 10.8, expressly applied only to merchandise to be classified in accordance with subheading 9802.00.40, HTSUS, which in 1993, covered articles exported for repairs or alterations "made pursuant to a warranty". Pl.'s Reply at 15. "It did not expressly apply to articles to be classified in accordance with HTSUS subheading 9802.00.50, which covered articles exported for repairs or alterations not made pursuant to any warranty." *Id.* In response, Defendant agreed that 19 C.F.R. § 10.8 is not applicable in this case. *See* Def.'s Reply at 2.

[15] The value of the foreign repairs or alterations is either the cost to the importer of such change or if no charge is made, the value of such change, as set out in the invoice and entry papers, as long as Customs determines that the amount set out represents a reasonable cost or value. *See* Chapter 98, Subchapter II U.S. Note 3(a).

[16] "This tariff classification position is alternative to the position set forth above for classification of imported AL–304 under HTSUS (1993) subheading 3823.90.4500." Pl.'s Mem. at 45.

C.D. 3070 (1967)(finding a new article was created where pattern pieces, labels, thread, and zippers were exported abroad and sewn into unfinished dresses); *Amity Fabrics, Inc. v. United States*, 43 Cust. Ct. 64, 68, C.D. 2104 (1959)(holding that dyeing merchandise sent abroad constitutes an alteration because there was no change in the character, quality or texture of the merchandise).

The term "alteration" as it was used in the predecessor to subheading 9802.00.50, HTSUS, Item 806.20, TSUS, was analyzed by the Customs Court in *Dolliff & Company, Inc. v. United States*, 81 Cust. Ct. 1, C.D. 4755, 455 F. Supp. 618 (1978). There, the domestic loom products made in the United States were exported to Canada as greige[17] goods for further processing and imported back into the United States. The Customs Court denied Item 806.20 treatment to the merchandise because the exported unfinished goods were returned as finished fabrics. *Id.* at 3–4, 455 F. Supp. at 620–21. The Court of Customs and Patent Appeals affirmed the lower court, 66 CCPA 77, 82, C.A.D. 1225, 599 F.2d 1015, 1019 (1979), holding that "repairs and alterations are made to completed articles and do not include intermediate processing operations which are performed as a matter of course in the preparation or the manufacture of finished articles." Thus, alterations can only be made to finished articles.[18]

Plaintiff argues "the alpha olefins exported to France are 'completed goods' for tariff purposes * * *. They are finished alpha olefins, which are discrete chemical compounds of established structure and known properties." Pl.'s Mem. at 49. Plaintiff maintains that the foreign processing does not constitute "intermediate processing," as the olefin starting mixture is no more or less "finished" or "complete" than the resulting alkylbenzenes. *Id.* at 50. The Court does not agree.

The Court finds that the process undertaken in France is intermediate processing because the exported olefin fraction is "unfinished." Plaintiff mistakenly defines "finished" too narrowly. The question is not whether the alpha olefin fraction is finished for purposes of being manufactured into AL–304 alkylbenzenes. Rather, the issue is whether or not the exported olefin fraction is a finished product for tariff purposes. The Customs Court has described finished in terms of how far an item has been processed toward its ultimate use. *See Strickland Enterprises, Inc. v. United States*, 64 Cust. Ct. 406, 409, C.D. 4009 (1970)(noting that an item estimated to be fifteen to twenty percent completed is a partly finished article); *see also United States v. J.D. Richardson Co.*, 36 CCPA at 18 (finding that exported articles that are not yet suitable for their intended use are unfinished). Thus, in order for an article to be

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[17] Greige is defined as not bleached or dyed; unfinished. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 795 (3rd ed. 1992).

[18] This view is also consistent with the court's previous interpretation of the term "alteration" as it was used in the predecessor to Item 806.20, TSUS. In *United States v. J.D. Richardson Co.*, 36 CCPA 15, 16–18, C.A.D. 390 (1948), *cert. denied*, 336 U.S. 936 (1949), the Court of Customs and Patent Appeals held that unflanged rims were in an "unfinished condition" because they were unsuitable for their intended use as exported. *Id.* at 18. Further, the court found that Congress intended only those articles exported in a "finished" condition to be eligible for preferential tariff treatment accorded articles exported for alteration. *Id.*

"finished" it must be suitable for its ultimate intended use. *See, e.g., Peg Bandage, Inc. v. United States*, 17 CIT 1337, 1346 (1993)(finding that because the exported unsewn bandages are unsuitable for their intended use as reusable bandages, the sewing operations performed in Haiti are not alterations), *appeal dismissed*, 22 F.3d 1106 (Fed. Cir. 1994). Here, Plaintiff's olefin fraction is "unfinished" for purposes of the production of alkylbenzene sulfonates. Indeed, Plaintiff concedes that "[t]he alpha olefins do not contain the benzene rings that are contained in the alkylbenzene sulfonic acids and, as such, they first must be processed into AL–304 before they can be further manufactured into alkylbenzene sulfonic acids."[19] Pl.'s Statement Resp. to Questions Posed by the Court (June 9, 1999) at 2. Because the processing undertaken in France is performed as a matter of course in the preparation of the alkylbenzene sulfonates it constitutes intermediate processing and thus, is not an alteration. Accordingly, the subject AL–304 is not covered under subheading 9802.00.50, HTSUS, and thus, should be assessed with duty at its full value under heading 3817.

CONCLUSION

For the foregoing reasons, the Court finds that U.S. Customs correctly classified Plaintiff's imported AL–304 under subheading 3817.10.10, HTSUS. Accordingly, Plaintiff's Motion for Summary Judgment is denied. In turn, Defendant's Motion for Summary judgment is granted and judgment is entered for Defendant.

(Slip Op. 99–73)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND L & S BEARING CO., PEER BEARING CO., AND SHANGHAI GENERAL BEARING CO., LTD., DEFENDANT-INTERVENORS

Court No. 97–03–00394

Plaintiff, The Timken Company ("Timken"), moves pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record challenging the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results and Partial Termination of Antidumping Duty Administrative Review*, 62 Fed. Reg. 6,173 (Feb. 11, 1997).

Timken claims that Commerce erred in: (1) selecting Indonesian, rather than Indian, import statistics for valuing the steel used by Chinese producers to manufacture cups and cones for tapered roller bearings ("TRBs"); (2) failing to adjust overhead, selling, general and administrative expenses ("SG&A"), and profit rates to account for differences in material and labor values of other surrogate sources used in determining foreign market value ("FMV"); (3) failing to deduct import duties paid by an Indian steel producer on

[19] Moreover, Plaintiff's argument concerning classification of the AL–304 under subheading 3823.90.45, HTSUS, *see* discussion *infra* pp. 14–15, rests upon the proposition that the AL–304 is an "incomplete or unfinished" sulfonate.

raw-material imports which were included in the denominator of the overhead, SG&A, and profit ratios; (4) using Indian public labor data rather than an Indian steel producer's data as surrogate values for the direct-labor factor of production used to determine FMV of the TRBs; (5) selecting a certain Indian tariff classification to value cold-rolled steel sheet used by Chinese producers to manufacture cages for TRBs; (6) including "purchases of traded goods" in an Indian steel producer's cost of manufacturing ("COM") when calculating the overhead. SG&A and profit rates; (7) failing to adjust United States price ("USP") for marine insurance costs based on value rather than weight; and (8) terminating the antidumping duty order for this administrative review with respect to defendant-intervenor Shanghai General Bearing Company, Ltd.

Held: Timken's motion for judgment on the agency record is granted in part and denied in part. Case is remanded to Commerce to: (1) further investigate and determine the appropriate measurement for valuing cold-rolled steel sheet used by Chinese producers to manufacture cages for TRBs; (2) exclude the "purchases of traded goods" from the COM used in the overhead, SG&A and profit-rate calculations; and (3) adjust USP by recalculating marine insurance pursuant to a value-based methodology. Commerce's final determination is affirmed in all other respects.

[Timken's motion is granted in part and denied in part. Case remanded.]

(Dated July 30, 1999)

Stewart and Stewart (Terence P. Stewart, Mara M. Burr, James R. Cannon, Jr., Charles A. St. Charles and *Amy S. Dwyer)* for The Timken Company.

David W. Odgen, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Henry R. Felix);* of counsel: *Rina Goldenberg*, Office of the Chief Counsel, for Import Administration, United States Department of Justice, for Defendant.

Cohen Darnell & Cohen, PLLC (Mark A. Cohen) for L & S Bearing Company.

Arent Fox Kintner Plotkin & Kahn, PLLC (John M. Gurley and *Matthew J. McConkey)* for Peer Bearing Company.

Reed Smith Shaw & McClay (James K. Kearney) for Shanghai General Bearing Company, Ltd.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff, The Timken Company ("Timken"), moves pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record challenging the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results and Partial Termination of Antidumping Duty Administrative Review* ("Final Results"), 62 Fed. Reg. 6,173 (Feb. 11, 1997).

BACKGROUND

The administrative review at issue concerns tapered roller bearings ("TRBs") and parts thereof, finished and unfinished, imported from the People's Republic of China ("PRC") during the eighth period of review covering June 1, 1994 through May 31, 1995.[1] Commerce published the preliminary results of the subject review on August 5, 1996. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Preliminary Results of Antidumping Ad-*

[1] Since the administrative review at issue was initiated prior to January 1, 1995, the applicable law is the antidumping statute as it existed prior to the amendments made by the Uruguay Round Agreements Act, Pub.L. No. 103-465, 108 Stat. 4809 (1994). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

ministrative Review and Intent to Revoke Antidumping Duty Order in Part ("Preliminary Results"), 61 Fed. Reg. 40,610. On February 11, 1997, Commerce published the Final Results at issue. *See* 62 Fed. Reg. 6,173. The Court granted L & S Bearing Company's Motion to Intervene on May 20, 1997, after which the company did not file any additional papers.

DISCUSSION

The Court has jurisdiction in this case pursuant to 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final antidumping determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

A. *Commerce's Selection of Indonesian Import Statistics as a Surrogate Value for Raw-Material Costs of Steel Used by Chinese Producers to Manufacture TRB Cups and Cones*

In this case, Commerce determined that the TRBs from the PRC were being sold in the United States at a price less than what the foreign merchandise sells for in the home market, that is, being sold at less than its fair value ("LTFV"). Further, the International Trade Commission determined that these LFTV sales threatened the United States domestic industry producing the same merchandise with material injury. Because Commerce determined that the PRC is a non-market economy ("NME") country, Commerce calculated the foreign market value ("FMV") of the TRBs using the factors of production ("FOPs") based on values from surrogate countries pursuant to 19 U.S.C. § 1677b(c) (1988).

In the Preliminary Results, Commerce used data from a 1994–95 annual report ("Report") of SKF Bearings India, Ltd. ("SKF India"), a producer of similar merchandise in India, to determine the values of the following FOPs for calculating FMV: (1) overhead; (2) selling, general and administrative expenses ("SG&A"); and (3) profit. *See* 61 Fed. Reg. at 40,613. For the direct-labor factor, Commerce used surrogate values derived, with adjustments, from Indian public labor data, *Investing, Licensing & Trading Conditions Abroad, India* ("IL&T"), published in November 1994 by the Economist Intelligence Unit. *See id.* For the raw-materials factor, Commerce used, with adjustments, Indian import statistics as the best information available ("BIA") for valuing the steel

used by Chinese producers to manufacture the TRBs.[2] *See id.* (citing *Monthly Statistics of the Foreign Trade of India, Volume II—Imports).*

In the Final Results, Commerce determined that, contrary to its preliminary determination, the Indian import statistics were not reliable for valuing bearing-quality steel used to produce TRB cups and cones because (1) Commerce was unable to isolate an Indian import value for bearing-quality steel, and (2) Commerce found that the value of the Indian import data was significantly higher than (a) bearing-quality steel imported into the United States, and (b) similar European Union steel-import data.[3] *See* 62 Fed. Reg. at 6,179–80. Commerce, therefore, selected India as a primary surrogate country for valuing steel used to produce TRB rollers and cages and Indonesia as a secondary surrogate country for valuing steel used to produce TRB cups and cones. *See id.* at 6,177, 6,180. Commerce further determined that these surrogates comprised the BIA for valuing raw-material costs in its FOPs calculations. *See id.* at 6,177.

In addition, in calculating the overhead, SG&A and profit-ratios, Commerce used data from SKF India's Report in both the numerators (SKF India's overhead, SG&A, and profit, respectively) and the denominator (the sum of SKF India's material and labor costs, that is, the total cost of manufacturing ("COM")). *See id.* at 6,178. Commerce noted that this methodology allowed it to derive internally consistent ratios of SKF India's overhead and SG&A expenses. *See id.* Commerce concluded that these ratios, when multiplied by the Indonesian and Indian raw-material costs and the IL&T labor data, constituted the BIA concerning overhead and SG&A expenses that would be incurred by a Chinese TRB producer given such FOPs. *See id.*

Timken's arguments challenging Commerce's use of surrogate values are multifaceted. First, Timken notes that Commerce's regulations and practices establish that surrogate values for FOPs should be obtained from the primary surrogate country unless those values are unavailable or unreliable. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 23–26. Timken, therefore, asserts that since the Indian import statistics were reliable, Commerce erred in blending Indonesian with Indian import data to value the raw-materials factor. *See id.* at 26–29. In particular, Timken argues (1) that there were not sufficient differences between United States, Indonesian and Indian import prices to justify the use of Indonesian, rather than Indian, import data to value TRB cups and cones, *see id.*, and (2) that Commerce's use of United States and European Union import data as benchmarks for assessing the reliability of the Indian import data was unreasonable, *see id.* at 30–32. Second, Timken claims

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[2] *See Tapered Roller Bearings and Certain Components Thereof From Japan; Clarification of Scope of Antidumping Finding*, 46 Fed. Reg. 40,550, 40,551 (Aug. 10, 1981) ("A complete [TRB] consists of a cone or inner race, cage (roller retainer), and roller in one assembled unit, and the cup or outer race, which is the outer ring on which the rollers turn.").

[3] *See* Final Results, 62 Fed. Reg. at 6,180, n.1 (noting that while the European Union import data do not have the same bearing quality steel category as do the United States data, the European Union import data do provide narrative descriptions that closely match the chemical composition of the steel that the Chinese producers used to manufacture TRB cups and cones).

that Commerce's selection of Indonesian import statistics in the Final Results was without notice to, or debate by, the parties, and thus, was arbitrary and unreasonable. *See id.* at 37–39. Third, Timken contends that the present case is distinguishable from the Federal Circuit's decision in *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442 (Fed. Cir. 1994), because Commerce has not articulated any legitimate policy for using Indonesian, rather than Indian, import data. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 39–40. Fourth, Timken argues that Commerce should have adjusted the overhead, SG&A, and profit rates, that is, reduced the COM denominator used in the calculation of these rates to reflect the use of lower raw-material and labor values from separate sources (that is, Indonesian and Indian import statistics and IL&T labor data, respectively). *See id.* at 44–46. Fifth, Timken argues that Commerce should have made an adjustment for import duties paid by SKF India on raw-material imports which were included in the calculations of the overhead, SG&A, and profit ratios. *See id.* In the alternative, Timken argues if the Court determines that Commerce's use of SKF India's unadjusted overhead, SG&A and profit rates was reasonable, then Commerce should be required to use SKF India's raw-material and labor costs when calculating such rates because SKF India's data provides an internally consistent source and greater accuracy compared to using the Indonesian and Indian raw-material statistics and the IL&T labor data for calculating such rates. *See id.* at 47–50.

Peer Bearing Company ("Peer") agrees with Commerce's position that Indian import statistics were an unreliable surrogate for valuing TRB cups and cones, necessitating the use of secondary surrogate values from Indonesia. *See* Peer's Resp. to Mot. J. Agency R. at 9–13. Peer asserts that Timken was not prejudiced by Commerce's use of Indonesian import data in the Final Results because Commerce released a memorandum to all parties in this review that listed five surrogate countries, and included Indonesia as a surrogate country. *See id.* at 12. Peer also claims that no adjustment of SKF India's overhead, SG&A and profit rates was necessary because Commerce's entire methodology for determining FMV in NME cases often is based on the application of ratios derived from one source to values derived from another. *See id.* at 15. Peer further argues that Commerce properly declined to deduct the import duties paid by SKF India on raw-material imports, that are included in the denominator of the overhead, SG&A and profit ratios, because, as Commerce noted in the Final Results, *see* 62 Fed. Reg. at 6,178, there was no evidence that such duties were paid. *See* Peer's Resp. to Mot. J. Agency R. at 15–16. Last, Peer argues that Commerce's use of SKF India's overhead, SG&A and profit rates does not require that Commerce use SKF India's material and labor costs because for each factor Commerce correctly selected the surrogate values which constituted the BIA. *See id.* at 16–17.

There is no question that the PRC is a NME. When the foreign merchandise under investigation is exported from a NME, 19 U.S.C.

§ 1677b(c) applies. Section 1677b(c) provides that when dealing with exports from NME countries, such as the PRC, the valuation of the FOPs is based on the BIA regarding the values of such factors in a market economy country or countries considered to be appropriate by Commerce. *See* 19 U.S.C. § 1677b(c)(1). The FOPs "include, but are not limited to—(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." *Id.* § 1677b(c)(3). In valuing these FOPs, the statute provides that Commerce "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *Id.* § 1677b(c)(4).

The Court finds that Commerce's (1) selection of Indonesian, rather than Indian, import data to value steel used to manufacture TRB cups and cones, (2) use of SKF India's overhead, SG&A and profit rates without adjustment, (3) refusal to deduct alleged import duties paid by SKF India on raw-material imports, and (4) use of IL&T labor data to value the direct-labor factor, are supported by substantial evidence and in accordance with law.

"Although Commerce expresses a strong preference for obtaining all factors values from a single surrogate source, both case law and Commerce's determinations are filled with instances in which Commerce used a blend of sources and surrogates to determine FMV." *Peer Bearing Co. v. United States*, 22 CIT ____, ____, 12 F. Supp. 2d 445, 455 (1998) (citing *Tianjin Mach. Import & Export Corp. v. United States*, 16 CIT 931, 940, 806 F. Supp. 1008, 1018 (1992) ("Commerce's ability to construct [FMV] from weighted alternatives advantageously serves the antidumping statutes purpose of 'determining current margins as accurately as possible.'"); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Partial-Extension Steel Drawer Slides with Rollers From the People's Republic of China*, 60 Fed. Reg. 54,472, 54,474 (Oct. 24, 1995) ("Although India is the preferred surrogate country, we have resorted to Indonesia for a certain surrogate value where an Indian value was determined to be inappropriate.")), *remand results aff'd*, 22 CIT ____, Slip Op. 98–161 (Dec. 7, 1998), *appeal docketed*, *Timken Co. v. United States*, No. 99–1204 (Fed. Cir. 1999). Nothing in the antidumping statute or its legislative history mandates that Commerce must derive FMV from surrogate-based values according to a certain methodology. *See Tianjin*, 16 CIT at 940, 806 F. Supp. at 1018. Rather, § 1677b(c)(1) "provides simply that 'valuation of the factors of production shall be based on the *best available information*' regarding values in a surrogate country. Additionally, Commerce shall only utilize 'to the extent possible' the prices or costs in the surrogate country." *See id.* (citation omitted). "Commerce's authority to select appropriate surrogate values to determine FMV based on FOP includes the authority to do so

without adjustment." *Peer Bearing*, 22 CIT at ____, 12 F. Supp. 2d at 455. Indeed, "[t]he statute does not require Commerce to follow any single approach in evaluating data." *Olympia Indus., Inc. v. United States*, 21 CIT ____, ____, Slip Op. 97–44, at 11 (Apr. 10, 1997) (citing *Lasko*, 43 F.3d at 1446). It was, therefore, within Commerce's authority to use India as a primary surrogate in conjunction with Indonesian values and IL&T labor data as the BIA for other values, without making any adjustment to SKF India's overhead, SG&A and profit rates.

The Court rejects Timken's assertion that Commerce erred in using United States and European Union data as benchmarks to test the reliability of the Indian import data for valuing TRB cups and cones. The Court has found in prior cases that comparing surrogate data to market economy data to determine the reliability of such surrogate data is within "'Commerce's statutory authority and consistent with past practice.'" *Peer Bearing*, 22 CIT at ____, 12 F. Supp. 2d at 455 (quoting *Writing Instrument Mfrs. Ass'n v. United States*, 21 CIT ____, ____, 984 F. Supp. 629, 639 (1997) (upholding use of United States benchmark as a point of comparison for two possible surrogate values) (quoting, in turn, *Olympia Indus., Inc.*, 21 CIT at ____, Slip Op. 97–44, at 12 (upholding Commerce's use of data from other market economies to test the reliability of surrogate country data))). Commerce, therefore, acted within its statutory authority by utilizing United States and European Union data to aid in its FOPs valuation. *See id.* (citing 19 U.S.C. § 1677b(c)(1), (4)). With respect to Timken's challenge to Commerce's decision to use Indonesian over Indian values for TRB cups and cones, the Court finds that Timken is assailing the correctness of of Commerce's result, not Commerce's methodology, which is outside the Court's standard of review. *See Writing Instrument*, 21 CIT at ____, 984 F. Supp. at 639. The Court, therefore, concludes that Commerce's use of data from other market economies as benchmarks to test the reliability of the Indian import data was reasonable.

The Court also rejects Timken's argument that Commerce's use of Indonesian surrogate values in the Final Results was without notice to Timken and, therefore, was arbitrary and unreasonable. "Commerce has the flexibility to change its position" from the preliminary to the final results, as long as Commerce explains "the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence." *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT ____, ____, 6 F. Supp. 2d 865, 879–80 (1998). Moreover, "[p]reliminary results, by their very nature, are preliminary and subject to change. Commerce has no obligation to inform the parties that a different surrogate will be used in the final determination than in the preliminary." *Peer Bearing*, 22 CIT at ____, 12 F. Supp. 2d at 456 (citing *Tehnoimportexport v. United States*, 15 CIT 250, 254–55, 766 F. Supp. 1169, 1174–75 (1991) (affirming final determination where Commerce chose one country as surrogate in the preliminary results and then used another surrogate for the final determination)).

The Court also rejects Timken's argument that Commerce's use of Indonesian import statistics is distinguishable from the Federal Circuit's decision in *Lasko*. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 39–40. In *Lasko*, the court considered whether or not § 1677b of the antidumping statute permits Commerce to determine FOPs using both surrogate country values and actual cost values and concluded that there was no error in Commerce's methodology of using both values. *See* 43 F.3d at 1445–46. The court opined that "[w]here we can determine that a NME producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices," and, "[t]herefore, using surrogate values when market-based values are available would, in fact, be contrary to the intent of the [antidumping statute]" of determining dumping margins "as accurately as possible." *Id.* at 1446 (internal quotation marks and citations omitted). But the court noted that "[i]n situations in which a statute does not compel a single understanding, * * * our duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute." *Id.* (internal quotation marks and citation omitted).

Timken asserts that, unlike *Lasko*, Commerce has not explained any "legitimate policy" served in this case by using Indonesian import data or rejecting Indian information. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 40. Specifically, Timken asserts that (1) the Indian, rather Indonesian, import data was more reliable as an indicator of bearing steel prices, and (2) Commerce's use of the Indonesian import data, because it was closer to United States import values than Indian data, was not a policy choice; rather, it was based on a faulty premise that Indian steel costs should approximate United States steel costs. *See id.*

Because the Court rejected these arguments above, the Court finds that Timken has otherwise failed to demonstrate how this case is distinguishable from *Lasko*. Moreover, the Court notes that *Lasko* supports Commerce's methodology of using both Indian and Indonesian import data to value the raw-materials factor. *See Lasko*, 43 F.3d at 1445–46.

In the absence of a statutory mandate to the contrary, Commerce's actions must be upheld as long as they are reasonable. The Court concludes that Commerce acted reasonably in applying surrogate values without adjustment in an attempt to capture the FMV of the PRC TRBs under review. Commerce also acted reasonably by not deducting import duties paid by SKF India on raw-material imports from the calculations of overhead, SG&A and profit rates because Commerce had no evidence as to the amount of duties, if any, that were included in SKF India's raw-material costs.

B. *Commerce's Selection of Tariff Classification 7209.42.00 to Value Cold-Rolled Steel Used to Produce TRB Cages*

In both the Preliminary and Final Results, Commerce used Indian tariff classification 7209.42.00 to value cold-rolled steel sheet used by

Chinese producers to manufacture cages for TRBs. *See* Final Results, 62 Fed. Reg. at 6,180. Timken objected to Commerce's use of this tariff subheading because it does not specify "carbon content," an essential characteristic that Chinese producers detailed in their descriptions of the cold-rolled steel sheet they used to manufacture TRB cages. *See id.* Timken, therefore, suggested Indian tariff classification 7211.41.00 because it more closely resembled the carbon content of the cold-rolled steel sheet. *See id.* In response, Chinese producers argued that although tariff subheading 7211.41.00 lists carbon content, it was not an appropriate subheading for valuing cold-rolled steel sheet used for TRB cages because the subheading does not separate out ranges of thickness for such steel. *See id.* Rather, subheading 7211.41.00 covers all such steel that is greater than 600 mm, while subheading 7209.42.00 has more defined boundaries for the thickness of such steel, that is, between 0 and 600 mm. *See id.* Commerce rejected Timken's suggestion based on the grounds that subheading 7211.41.00 covered "hot-rolled" steel sheet and, therefore, was not an appropriate category for valuing "cold-rolled" steel sheet used to produce TRB cages. *See id.*

Timken requests that if the Court affirms Commerce's use of Indian import statistics rather than SKF India's Report to value steel, then the Court should instruct Commerce to use Indian tariff subheading 7211.41.00. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 42. This subheading describes the specific carbon content of steel used to manufacture TRB cages in the PRC, compared to subheading 7209.42.00, which does not distinguish among the carbon content levels. *See id.*

Peer asserts that although Indian tariff subheading 7211.41.00 specifies carbon content, Timken's argument is flawed because subheading 7209.42.00 is more specific in other respects. *See* Peer's Resp. to Mot. J. Agency R. at 17. In particular, Peer notes that subheading 7209.42.00 more accurately describes the thickness of the steel used to produce TRB cages. *See id.* Peer, therefore, contends that Commerce's selection of subheading 7209.42.00 to value steel used to produce TRB cages was reasonable. *See id.*

Commerce agrees that Timken's suggested Indian tariff subheading 7211.41.00 does cover cold-rolled steel sheet and the appropriate carbon content. *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 25. Nevertheless, Commerce contends, as the Chinese producers indicated in the Final Results, *see* 62 Fed. Reg. at 6,180, that this subheading does not separate out ranges of thickness for such steel; rather, the category covers all cold-rolled steel sheet (with an appropriate carbon content) that is thicker than 600 mm. *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 25. Thus, Commerce asserts that the available cold-rolled steel sheet categories are divided into very thin sheets or very thick sheets with the appropriate carbon content. *See id.* Based on the current record, Commerce claims that it cannot determine what the average thickness is for the cold-rolled steel sheet that the Chinese producers used to produce TRB cages. *See id.* Commerce further contends that if subheading

7211.41.00 does not include the appropriate thickness, it cannot determine which of the two factors—thickness or carbon content of steel sheet—would be a more appropriate measurement for this particular raw material. *See id.* Commerce, therefore, requests that the issue be remanded for further investigation and a determination based on additional facts. *See id.*

The Court agrees with Timken that Indian tariff subheading 7211.41.00 does cover cold-rolled steel sheet and the appropriate carbon content. The Court, however, remands this issue to Commerce to further investigate and determine the appropriate measurement for valuing cold-rolled steel sheet that Chinese producers used to manufacture TRB cages.

C. *Commerce's Inclusion of "Purchases of Traded Goods" in SKF India's Costs of Materials*

In the Final Results, Commerce designated the line item "purchases of traded goods" in SKF India's Report as a material cost to be included in the COM that was used as the denominator of the overhead, SG&A, and profit-rate calculations. *See* 62 Fed. Reg. at 6,182. Timken noted that SKF India's Report identified these "traded goods" as "ball and roller bearings, bearing accessories and maintenance products, and textile machinery components." *Id.* (internal quotation marks omitted).

Timken asserts that the "purchases of traded goods" should be excluded from the COM denominator used in the overhead, SG&A and profit-rate calculations. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 50–51. Timken notes, as it did for the Final Results, *see* 62 Fed. Reg. at 6,182, that SKF India's Report separated "purchases of traded goods" from raw materials and bought out components consumed and, in another section of the Report, segregated them from goods SKF India manufactured and sold during the year. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 51. Timken further notes that in previous reviews Commerce included only steel costs in the cost of materials, but not finished products. *See id.* at 51. Since the "traded goods" are products that are purchased and sold by SKF India, and since they are already manufactured and do not affect production, Timken contends that the "traded goods" are not overhead or SG&A and are not material costs used in producing the subject merchandise. *See id.* at 50–51; *see also* Pl.'s Reply Mem. Supp. Mot. J. Agency R. at 20. Timken, therefore, requests that the Court remand the issue to Commerce to exclude the "purchases of traded goods" from the overhead, SG&A and profit-rate calculations. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 51.

Commerce responds, as it did in the Final Results, *see* 62 Fed. Reg. at 6,183, that in past reviews it did not include a line item for "purchases of traded goods" in the COM denominator because in previous reviews the SKF India reports, unlike the Report in this review, did not include a separate line item for such goods, *see* Def.'s Mem. Opp'n to Mot. J. Agency R. at 34. Commerce contends that it included the line item for "trade goods" because it concluded they were not overhead and SG&A

expenses, but instead reflected the costs associated with the production of merchandise. *See id.* at 33. Commerce asserts that it made this determination based on the description of the "purchases of traded goods" in SKF India's Report as the purchase of finished and semi-finished goods required to meet SKF India's clients' demands. *See id.* Commerce notes that SKF India did not incur direct materials or direct labor expenses for such "trade goods"; rather, it incurred the expense of purchasing them. *See id.* Because the "purchases of traded goods" are included in the calculation of the costs of goods sold, Commerce claims that they are ordinary business expenses. *See id.* Commerce, therefore, argues it acted reasonably and in accordance with law by including the "purchases of traded goods" as part of the COM denominator it used in the overhead, SG&A, and profit-rate calculations. *See id.* at 34.

Peer agrees with the position taken by Commerce, arguing that since the "purchases of traded goods" are semi-finished or finished goods, that is, the type of items which are routinely purchased by bearing manufacturers, they are material costs and, therefore, should not be excluded from SKF India's costs of materials. *See* Peer's Resp. to Mot. J. Agency R. at 16.

The Court disagrees with Commerce's determination. Although SKF India's Report stated that the "purchases of traded goods" were required to meet SKF India's clients' demands, Commerce failed to demonstrate how these already manufactured goods constitute a material cost incurred in manufacturing the subject merchandise. The Court, therefore, remands this issue to Commerce to exclude the "purchases of traded goods" from the COM used in the denominator of the overhead, SG&A, and profit-rate calculations.

D. *Commerce's Adjustment to USP for Marine Insurance*

In the Final Results, Commerce made an adjustment to USP for marine-insurance expense, that was incurred for shipping the Chinese producers' TRBs to the United States, by selecting a surrogate marine-insurance rate based on weight (that is, per ton) applicable to sulfur dyes shipped from India. *See* 62 Fed. Reg. at 6,185. Commerce decided to use this insurance rate based on weight because it was the only publicly available information and it had used the same rate repeatedly for other PRC analyses. *See id.*

Timken contends that Commerce unreasonably understated the marine-insurance expense by applying a surrogate marine-insurance rate on a per ton basis applicable to sulfur dyes from India. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 52. Timken argues that the rate should be based upon value rather than upon weight of the merchandise insured, reasoning that if a container of TRBs were lost at sea, there is no basis for the conclusion that an insurance payment for the loss of one ton of sulfur dye would have any relationship to the value of the loss of one ton of TRBs. *See id.* Thus, Timken suggests, as it did in the Final Results, *see* 62 Fed. Reg. at 6,185, that Commerce calculate a marine-insurance rate based upon the ratio of the insurance charged per ton of sulphur dye di-

vided by the value of the sulfur dye per ton (based on United States Customs, rather than sales, value) and apply this factor to the price of TRBs sold in the United States, *see* Pl.'s Mem. Supp. Mot. J. Agency R. at 52.

Peer argues that the Final Results should be affirmed because Commerce did not have publicly available information in the record which would allow it to calculate surrogate values for marine insurance any more accurately than it did. *See* Peer's Resp. to Mot. J. Agency R. at 18. Peer also emphasizes that value is not the only basis for setting an insurance rate. *See id.*

To justify its weight-based marine-insurance rate, Commerce argues that Timken failed to provide evidence of any other insurance premiums that are available in Asia based upon value. *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 35. "This, however, is not a sufficient reason to ignore the essence of insurance and the costs of insurance premiums paid by the insured. Insurance by definition is based upon pecuniary valuation, not on the weight of the product to be insured." *Peer Bearing*, 22 CIT at ____, 12 F. Supp. 2d at 458–59 (citing J. Kenneth Goodacre, *Marine Insurance Claims* 81–83 (2d ed. 1981) (discussing the importance of valuation and identification of subject matter in marine insurance policies to indemnify the insured); William R. Vance, *Handbook on the Law of Insurance* 156 (3d ed. 1951) (insurance provides indemnification for possible loss of a legal interest susceptible to pecuniary valuation)).

The Court finds that both the value of TRBs and the risks involved in transporting them are considerably different from the value and risks involved in shipping sulfur dyes. The Court, therefore, remands this issue to Commerce to adjust USP by recalculating the marine-insurance expense using a methodology reasonably related to the value and risks of transporting TRBs.

E. *Revocation of Shanghai's Antidumping Order*

In two actions, Timken is challenging the final results of the four administrative reviews that preceded this eighth review. *See Peer Bearing*, 22 CIT at ____, 12 F. Supp. 2d at 449 (covering the fourth, fifth and sixth reviews from June 1, 1990 through May 31, 1993); *Timken Co. v. United States*, Consol. Ct. No. 97–03–00419 (covering the seventh review from June 1, 1993 through May 31, 1994). In the final results of the seventh review, *see Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order* 62 Fed. Reg. 6,189 (Feb. 11, 1997), Commerce revoked the antidumping duty order as to Shanghai General Bearing Company, Ltd. ("Shanghai"), a Chinese TRB producer, *see id.* at 6,214, and based on that revocation, Commerce terminated the order for this review as to Shanghai, *see* Final Results, 62 Fed. Reg. at 6,173.

Timken asserts that the results of those two prior actions are expected to increase the antidumping margins for Shanghai, and this will thus require that the antidumping duty order be reinstated as to Shanghai. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 55. Timken, therefore, requests

that the Court order Commerce to resume the antidumping review of Shanghai for this review. *See id.*; Pl.'s Reply Mem. Supp. Mot. J. Agency R. at 23.

Commerce argues that its revocation of the antidumping duty order in the seventh review was proper and should be sustained. *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 35. Shanghai agrees with the position taken by Commerce. *See* Shanghai's Mem. Opp'n to Mot. J. Agency R. at 4. All parties' arguments regarding the revocation are set forth in the briefs for the second action covering the seventh review. *See Timken*, Consol. Ct. No. 97–03–00419.

Since the parties' arguments regarding Commerce's revocation of the antidumping duty order as to Shanghai are only presented in the action concerning the seventh review, *see id.*, and since the merits of that action have not been reviewed by this Court nor have the merits of the first action on appeal been adjudicated, we decline to address Commerce's revocation decision. Accordingly, we find no basis for reinstating the order as to Shanghai for this review.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce to: (1) further investigate and determine the appropriate measurement for valuing cold-rolled steel sheet that Chinese producers used to manufacture TRB cages; (2) exclude the "purchases of traded goods" from the COM used in the denominator of the overhead, SG&A and profit-rate calculations; and (3) adjust USP by recalculating marine insurance pursuant to a value-based methodology. Commerce's final determination is affirmed in all other respects.

(Slip Op. 99–74)

SAARSTAHL AG, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–04–00219

(Dated July 30, 1999)

ORDER

CARMAN, *Chief Judge:* This matter having been remanded by the Court of Appeals for the Federal Circuit in *Saarstahl AG v. United States*, Nos. 97–1122, 97–1135, 98–1122 (Fed. Cir. Slip Op. April 12, 1999), and upon consent of the parties, it is hereby

ORDERED that this matter is remanded to the Department of Commerce for the recalculation of repayment based upon (1) the use of purchase price paid for Saarstahl SVK, and (2) the net worth of Saarstahl SVK; and it is further

ORDERED that the parties shall be allowed to submit an English-language translation of the financial statements already on the record for use in determining the net worth of Saarstahl SVK, as well as a written explanation of how net worth can be calculated from such financial statements; and it is further

ORDERED that Commerce shall issue its final results of redetermination not later than sixty days after issuance of this order.

(Slip Op. 99–75)

LTV STEEL CO., INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00568

(Dated July 30, 1999)

ORDER

CARMAN, *Chief Judge:* This matter having been remanded by the Court of Appeals for the Federal Circuit in *LTV Steel Co. v. United States*, 174 F.3d 1359 (Fed. Cir. 1999), and upon consent of the parties, it is hereby

ORDERED that this matter is remanded to the Department of Commerce for the recalculation of repayment based upon (1) the use of purchase price paid for Saarstahl SVK, and (2) the net worth of Saarstahl SVK; and it is further

ORDERED that the parties shall be allowed to submit an English-language translation of the financial statements already on the record for use in determining the net worth of Saarstahl SVK, as well as a written explanation of how net worth can be calculated from such financial statements; and it is further

ORDERED that Commerce shall issue its final results of redetermination not later than sixty days after issuance of this order.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C99/117 7/30/99 Barzilay, J.	Straumann Co.	97–8–01384	9021.21.8000, 9018.49.8040, 9021.21.4000, 9018.49.8080 Not stated (Note: Consumption Entry No. 004–7329322–3 was assessed merchandise processing ad valorem fee provided for in sec. 24.23 of the Customs Regulations (19 CFR 24.23)	9817.00.96 Not stated (Note: Consumption Entry No. 004–7329322–3, as to portion of the entered value, exempt from merchandise processing fee	Nobelpharma USA Inc. *v.* U.S. 955 FSupp. 1491 (1997)	Boston Hollow cylinder titanium implants etc.
C99/118 8/3/99 Barzilay, J.	EM Industries, Inc.	98–12–03192	3206.10.00, 3206.11.00, 3206.19.00, etc. Various rates	3206.49.50 3.1% [subject to appraisement under transaction value at US$107,360]	Agreed statement of facts	Atlanta Pearlescent pigments

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